No. 97-1192-CFY Title: Swidler & Berlin and James Hamilton, Petitioners
v.
United States

Docketed:
January 16, 1998 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Dec 31 1997	Petition for writ of certiorari filed. (Response due February 15, 1998)
	Feb 17 1998	Brief of respondent United States in opposition filed.
	Feb 17 1998	Brief amicus curiae of American College of Trial Lawyers filed.
	Feb 17 1998	Brief amicus curiae of American Bar Association filed.
	Feb 17 1998	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Feb 27 1998	Reply brief of petitioner Swidler & Berlin filed.
	Mar 4 1998	DISTRIBUTED. March 20, 1998
	Mar 23 1998	REDISTRIBUTED. March 27, 1998
	Mar 30 1998	Petition GRANTED. SET FOR ARGUMENT June 8, 1998. **********
	Apr 1 1998	Motion of Independent Counsel to expedite the briefing and argument schedule filed.
	Apr 2 1998	Response of petitioners to motion of the United States to expedite the briefing schedule and argument.
	Apr 6 1998	Motion of Independent Counsel to expedite the briefing and argument schedule GRANTED. The brief of petitioners and the joint appendix are to be filed with the Clerk and served uopn Independent Counsel on or before 3 p.m., Wednesday, April 29, 1998. The brief of Independent Counsel is to be filed with the Clerk and served upon petitioners on or before 3 p.m., Wednesday, May 20, 1998. A reply brief, if any, may be filed with the Clerk and served upon Independent Counsel on or before 3 p.m., Monday, June 1, 1998. Briefs may be submitted in compliance with Rule 33.2 to be replaced with briefs prepared in compliance with Rule 33.1 as soon as possible thereafter. Rule 29.2 does not apply. Argument is set for 10 a.m., Monday, June 8, 1998.
	Apr 16 1998	Record filed.
	Apr 21 1998	Record filed.
	Apr 29 1998	Joint appendix filed.
	Apr 29 1998	Brief of petitioners Swidler & Berlin and James Hamilton filed.
	Apr 29 1998	Brief amicus curiae of American Bar Association filed.
	Apr 29 1998	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Apr 29 1998	Brief amicus curiae of American College of Trial Lawyers filed.
	May 12 1998	CIRCULATED.
	May 20 1998	Brief of respondent United States filed.
	Jun 1 1998	Reply brief of petitioners Swidler & Berlin and James Hamilton filed.

No. 97-1192-CFY

Entry	Date	Proceedings and Orders
	Jun 8 1998	ARGUED.
	Jun 25 1998	Adjudged to be REVERSED. Rehnquist, C. J., delivered the opinion of the Court, in which Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined.

No. ———

In The Supreme Court of the United States

October Term, 1997

Swidler & Berlin and James Hamilton,
Petitioners,

v.

United States of America,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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85 pp

QUESTIONS PRESENTED

1. Whether, when a client dies, the attorney-client privilege in a criminal proceeding is no longer absolute, but is subject to a balancing test that requires the attorney to produce evidence of privileged communications with the client if they "bear on a significant aspect" of the case "as to which there is a scarcity of reliable evidence."

2. Whether, as a matter of law, an attorney's handwritten notes taken during an initial interview with a client do not receive the virtually absolute work product protection otherwise afforded to an attorney's "mental impressions," because at this stage the lawyer "has not sharply focused or weeded the materials" and exercised professional judgment as to what to record.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals were Swidler & Berlin, James Hamilton and the United States of America.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ——

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

Swidler & Berlin and James Hamilton petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The majority opinion of the court of appeals and a redacted version of the dissenting opinion are reported at 124 F.3d 230 and are printed in full at Pet. App. 1a-26a. The court's order on petition for rehearing, and the opinion dissenting from denial of rehearing (Pet. App. 27a-32a), are reported at 129 F.3d 637. The district court issued a separate opinion for each of the two subpoenas involved. The opinions, which are identical except for the docket numbers and caption, are not reported and are printed at Pet. App. 33a-42a and 43a-53a.

JURISDICTION

The court of appeals entered its judgment on August 29, 1997. The court entered the order denying a petition for rehearing on November 21, 1997. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 501 of the Federal Rules of Evidence and Rule 26(b)(3) of the Federal Rules of Civil Procedure appear at Pet. App. 54a-56a.

STATEMENT

On July 11, 1993, in the midst of intense public controversy about the White House Travel Office, White House Deputy Counsel Vincent Foster met with Washington, D.C., attorney James Hamilton to discuss possible legal representation. Before the conversation began, Mr. Foster asked Mr. Hamilton if the conversation was privileged and received assurance that it was. Pet. App. 41a. They then spoke for two hours, during which Mr. Hamilton took three pages of notes. Pet. App. 31a. Nine days later, Mr. Foster committed suicide.

On December 4, 1995, a federal grand jury, at the request of Independent Counsel, issued subpoenas to Mr. Hamilton and his law firm, Swidler & Berlin, seeking Mr. Hamilton's handwritten notes of this conversation. Mr. Hamilton and his firm filed motions to quash or modify. The district court (Chief Judge Penn) inspected the notes *in camera*. He found that "one of the first notations on the [notes] is the word: 'Privileged,' so it is obvious that . . . Foster . . . viewed . . . the notes of that conversation as privileged." Pet. App. 41a. He also found that the notes were prepared in anticipation of litigation and "reflect the mental impressions of the lawyer." Pet. App. 42a. The district court thus concluded that both the attorney-client and work product privileges barred disclosure. Pet. App. 42a.

The Court of Appeals for the District of Columbia Circuit reversed. Recognizing that "the communications at issue would be covered by the [attorney-client] privilege if the client were still alive," the court concluded that "the client's death calls for a qualification of the privilege." Pet. App. 2a. The "qualification" created by the court permits "post-death use [of the otherwise privileged communication] in criminal proceedings" where the prosecutor convinces the trial court that the "relative importance [of the communication] is substantial." Pet. App. 10a. In his briefs to the court of appeals, Independent Counsel had not advocated such a balancing process.

The court of appeals reasoned that the prospect of post-death revelation in the criminal context will trouble a client less than in the civil context, because after death "criminal liability will have ceased altogether" while civil liability "characteristically continues." Pet. App. 6a. The court recognized that a concern for survivors might stir a desire to protect the estate from civil liability, but did not discuss whether the same concern might foster an interest in protecting the living from criminal penalties. Pet. App. 6a. The court also "doubted" that the client's concerns for post-death reputation would be "very powerful; and against them the individual may even view history's claims to truth as more deserving." Pet. App. 7a.

As to the other side of the balance, the court concluded that the client's death heightens the prosecutor's need for otherwise privileged communications. The court concluded that "unavailability through death, coupled with the non-existence of any client concern for criminal liability after death, creates a discrete realm (use in criminal proceedings after death of the client)" where the privilege should give way upon the prosecutor's showing of need. Pet. App. 7a-8a.

The court of appeals also held that the notes were not protected by the work product privilege. The court recognized prior decisions holding that attorney interviews

conducted "as part of a litigation-related investigation" receive heightened work product protection even as to factual material, because "the facts elicited necessarily reflected a focus chosen by the lawyer." Pet. App. 13a. However, the court concluded that the present case is different because "the interview was a preliminary one initiated by the client. Although the lawyer was surely no mere potted palm, one would expect him to have tried to encourage a fairly wide-ranging discourse from the client, so as to be sure that any nascent focus on the lawyer's part did not inhibit the client's disclosures." Pet. App. 13a. Because of the court's conclusive presumption that, at this stage, the lawyer "has not sharply focused or weeded the materials," it concluded that the notes did not deserve the "super-protective envelope" normally afforded opinion work product. Pet. App. 13a-14a.

Judge Tatel dissented. While conceding that concern for surviving friends and family or posthumous reputation "may not influence *every* decision to confide potentially damaging information to attorneys," Judge Tatel concluded that "these concerns very well may affect *some* decisions, particularly by the aged, the seriously ill, the suicidal, or those with heightened interests in their posthumous reputations." Pet. App. 23a (emphasis in original). Judge Tatel argued that, after the court's decision, such persons will not talk candidly with a lawyer after they receive the advice the court's opinion now requires lawyers to give:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

Pet. App. 20a (emphasis in original). Judge Tatel concluded that the court's decision "strikes a fundamental

blow to the attorney-client privilege and jeopardizes its benefits to the legal system and society." Pet. App. 26a.

The court of appeals denied Appellees' petition for rehearing *in banc*, with two dissents as to the attorney-client privilege issue (Judges Tatel and Ginsburg).[1] Pet. App. 28a. The dissent emphasized that Independent Counsel had offered no "evidence" that abrogating the attorney-client privilege after death will not chill client communications with attorneys. Pet. App. 31a. Such evidence, the dissent argued, is required to overturn the common law rule that the privilege survives death—a rule resting on the proposition that it is necessary to promote candid client disclosures.

Judge Tatel also dissented on the work product issue. He disagreed with the court's conclusive presumption that attorney notes taken at an initial client interview do not reflect the attorney's mental impressions because the lawyer does not "sharply focus[] or weed[]" the words of a client at an initial session. Pet. App. 30a. Instead, Judge Tatel argued, "lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients." *Id.* "Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the 'opinions, judgment, and thought processes of counsel'." Pet. App. 31a (citation omitted). Judge Tatel found that Mr. Hamilton had "created only three pages of notes" from a two-hour conversation, and that the notes "bear the markings of a lawyer focusing the words of his client; he underlined certain words, placing both checkmarks and question marks next to certain sections." *Id.* Consequently, Judge Tatel concluded, "[t]he notes clearly represent the opinions, judgment, and thought processes of counsel," the same conclusion the district court had reached. *Id.*

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[1] Judges Sentelle and Garland did not participate.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision on attorney-client privilege is important and warrants this Court's review because it denies persons who expect to die soon—whether because of advanced age, illness, suicide, or a dangerous life-style—the right to consult attorneys in confidence about criminal matters that threaten friends, associates, family or their own reputations. The decision thus defeats the fundamental purpose of the privilege, which is to encourage full and frank communication between attorneys and clients and thereby promote observance of law and the administration of justice. The decision also conflicts with several state decisions denying posthumous disclosure of attorney-client communications in criminal cases, as well as with decisions of the Ninth Circuit and various state courts reaching the same conclusion in civil contexts. And the decision conflicts with the determination of many state legislatures that the privilege survives death.

The court of appeals' decision is wrong because it erroneously assumes that persons facing death do not care whether their friends, associates, family, or their own reputations are harmed by disclosures after death. This assumption wars with the fact that people write wills, establish trusts, buy life insurance and burial plots, establish foundations, endow chairs, and write memoirs—actions evincing concern for what happens to the well-being of others and their own reputations following death. The decision also is at odds with the decisions of this Court disparaging balancing tests and other standards that result in uncertain privileges. And it ignores the "reason and experience" (which must be considered under Federal Evidence Rule 501) exemplified by state court opinions and legislative pronouncements that are virtually unanimous in recognizing that the privilege remains intact after the client's death.

The court's decision on the work-product privilege will encourage attorneys not to take notes at initial client or

witness interviews, thereby damaging the quality of legal representation with no offsetting benefit to the administration of justice. The decision conflicts with decisions of this Court and several courts of appeals that accord the highest degree of work product protection to attorney notes containing factual statements where the manner of recordation reflects the attorney's selection and judgment. The decision is wrong because it presumes that attorneys at initial client interviews do not exercise professional judgment in determining what client statements to record and how to record them—a notion belied by the experience of seasoned practicing attorneys.

For these reasons, this Court should grant review on both issues.

1. The Attorney-Client Issue

a. Every year, hundreds of thousand of Americans learn that they have a life-threatening illness.[2] Many of these people may wish to talk to an attorney about matters with criminal implications. Yet under the court of appeals' decision they do so at peril because, after they die, prosecutors who show need for the evidence can obtain access to their attorneys' notes. The decision imposes the same impediment on the elderly, the suicidal, those engaged in hazardous lifestyles, and others concerned about mortality. It defies reason and experience to assume that many of these people do not care about disclosures that might harm others or their own reputation after death. By denying the full protections of the attorney-client privilege to such people, the decision discrimi-

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[2] In 1993, some 665,000 persons died of cancer or as a consequence of HIV infection. U.S. Department of Commerce, *Statistical Abstract of the United States 1996* (1996), at 96. Given the nature of these diseases, it seems likely that most of these persons were aware for some period of time that they were likely to die soon. The American Cancer Society estimates that there were 1.3 million new cancer cases in 1996. *Id.* at 145.

nates against the aged, the diseased, and the distraught—against society's most vulnerable.

The decision's damaging effect is not ameliorated by the court's attempt to limit disclosure to "the discrete zone of criminal litigation" (Pet. App. 8a). A client's concern for family, friends and associates surely will extend to their potential criminal as well as civil liabilities. A dying person may be troubled far more by a loved one's possible incarceration that by some civil sanction. Especially given the increasing utilization of criminal law as a means of commercial and ethical regulation, a client who believes that death is a not-too-distant possibility will be loath to speak to a lawyer about troubles involving friends, family or close associates if advised that confidentiality evaporates upon his or her demise.

Nor will the client be reassured by the court of appeals' statement that disclosure is limited to statements whose "relative importance is substantial" (Pet. App. 10a). "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*, 116 S.Ct. 1923, 1932 (1996) (patient-therapist privilege). Under the court's balancing test, the trial judge is most likely to perceive a need for privileged information in precisely those situations where the client would be most concerned about the criminal ramifications of disclosure on family, friends or associates. At the least, such a balancing test renders the attorney-client privilege uncertain, and "[a]n uncertain privilege is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Surely, uncertainty of this sort will chill attorney-client communications.[3]

[3] The record demonstrates that Mr. Foster, had he not been assured the conversation was privileged, would not have confided in Mr. Hamilton and the notes at issue would not exist. Pet. App. 41a. Considering that the conversation occurred just nine days before Mr. Foster took his own life, he likely also would have been reluctant to confide had he been informed that the conversation was privileged *unless you die*.

There is no merit to the court of appeals' argument that the privilege already is so beset with exceptions that one more will make little difference. Pet. App. 8a-10a. The court cited the so-called "crime-fraud" exception, but for this exception to apply "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997). A client will know whether he or she consults an attorney to further a criminal or fraudulent scheme. For clients lacking such intent, advice that an improper purpose could destroy confidentiality will not undermine candor. The same cannot be said of advice that the privilege may perish with death when the client is elderly, severely ill, or suicidal.

There is, moreover, a basic flaw in the argument that one more exception to the privilege should not be unduly injurious, given those that exist. Despite the extant exceptions, the attorney-client privilege still is vital to our system of justice. All citizens—including the elderly and seriously ill—still have a right to talk to an attorney in confidence. The courts still have a paramount interest in assuring that clients tell their attorneys the whole truth. Most attorneys still take seriously their professional obligation to preserve confidences. Contrary to the panel's conclusion, in most circumstances "belief in an absolute attorney-client privilege" is not, and should not be, "illusory." (Pet. App. 8a) The court of appeals' reasoning can only further a progressive erosion of the privilege, for each added exception fuels the argument that yet one more can do little additional harm.

b. There is a conflict between the court of appeals' decision on attorney-client privilege and the holdings of other federal and state courts.

The decision conflicts with the holdings of seven states in criminal cases.[4] This Court has stressed the importance of uniformity between federal and state court decisions on privilege issues, because "any State's promise of confidentiality would have little value" if the client is aware that the confidential communication may be revealed in federal court. *Jaffee v. Redmond*, 116 S.Ct. 1923, 1930 (1996).

The court of appeals' decision also conflicts with decisions of the Ninth Circuit[5] and 13 states[6] holding that the attorney-client privilege survives the client's death in

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[4] The following decisions excluded from criminal proceedings evidence of communications between a deceased person and that person's attorney: *Mayberry v. Indiana*, 670 N.E.2d 1262 (Ind. 1996); *In re a John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990); *People v. Modzelewski*, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994); *Arizona v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976), *cert. denied*, 439 U.S. 1006 (1978); *People v. Pena*, 198 Cal. Rptr. 819, 829 (Cal. Ct. App. 1984); *Cooper v. State*, 661 P.2d 905, 907 (Okla. Crim. App. 1983); *South Carolina v. Doster*, 284 S.E.2d 218, 220 (S.C.), *cert. denied*, 454 U.S. 1030 (1981).

[5] *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977); *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812, 815 (9th Cir. 1942). In *Osborn*, the disclosure had criminal implications; the district court had allowed intervenors to claim the Fifth Amendment privilege as to some documents at issue. 561 F.2d at 1336.

[6] *Doyle v. Reeves*, 152 A. 882 (Conn. 1931); *De Loach v. Myers*, 109 S.E.2d 777 (Ga. 1959); *Hitt v. Stephens*, 675 N.E.2d 275 (Ill. App. Ct.), *appeal denied*, 679 N.E.2d 380 (Ill. 1997)); *Estate of Voelker*, 396 N.E.2d 398 (Ind. Ct. App. 1979); *Bailey v. Chicago, Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 564 (Iowa 1970); *Stegman v. Miller*, 515 S.W.2d 244, 246 (Ky. 1974); *Rich v. Fuller*, 666 A.2d 71, 74-75 (Me. 1995); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264 (Mo. Ct. App. 1976); *Lennox v. Anderson*, 1 N.W.2d 912 (Neb.), *modified on other grounds*, 3 N.W.2d 645 (Neb. 1942); *Clark v. Second Judicial District Court*, 692 P.2d 512 (Nev. 1985); *Taylor v. Sheldon*, 173 N.E.2d 892, 895 (Ohio 1961); *Miller v. Pierce*, 361 S.W.2d 623, 625 (Tex. Civ. App. 1962); *In re Smith's Estate*, 57 N.W.2d 727 (Wis. 1953).

civil cases. None of these cases recognizes a distinction between the civil and criminal contexts.

The court of appeals' attempt to limit its decision to criminal cases will not withstand scrutiny. If the court of appeals is correct in holding that a plausible claim of necessity in the criminal context allows posthumous disclosure, scant reason exists to deny posthumous disclosure where a party to civil litigation plausibly claims the evidence is critical. Moreover, disclosures made in the criminal context could be used in related civil matters.

With the exception of one case from a mid-level state appellate court that until now has never been followed,[7] there are only three situations in which the courts have allowed or suggested the propriety of posthumous disclosure of otherwise confidential attorney-client communications in criminal or civil proceedings. Disclosure is allowed in testamentary disputes for the purpose of determining the decedent's intent. Pet. App. 9a. *Glover v. Patten*, 165 U.S. 394, 406-08 (1897); *United States v. Osborn*, *supra*, 561 F.2d at 1340 n.11. But an exception designed to implement client intent does not support creating another exception to thwart it. Indeed, this Court's decision in *Glover v. Patten*, the leading case on the testamentary exception, is premised on the assumption that, except in the testamentary contexts, the privilege applies and bars disclosure.

Posthumous disclosure also has been allowed where a husband accused of murdering his wife attempts to use the privilege to bar his wife's lawyer from testifying that she told him of threats made by the husband. In those cases, the husband's obvious conflict of interest bars him from asserting the privilege on behalf of his wife.[8] No

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[7] *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

[8] *Arizona v. Gause*, 489 P.2d 830 (Ariz. 1971), *vacated on other grounds*, 409 U.S. 815 (1972); *Wyoming v. Kump*, 301 P.2d 808 (Wyo. 1956).

such conflict of interest is present in the case at bar.[9]

Finally, there is dicta suggesting that a criminal defendant might have a constitutional right to obtain testimony from a lawyer that his or her deceased client admitted in a privileged conversation committing the crime at issue.[10] Disclosure of a privileged conversation to aid a criminal defendant would be consonant with case law holding that otherwise valid exclusionary rules may be overridden where the evidence is vital to the accused's exercise of his constitutional right to present a defense. *Davis v. Alaska*, 415 U.S. 308 (1974) (public disclosure of juvenile court record of prosecution witness).[11] But the Court need not reach this issue, because Independent Counsel's claim to the attorney notes in this case does not concern a criminal defendant's constitutional right to present evidence that may establish innocence.

c. Rule 501 of the Federal Rules of Evidence provides that a privilege "shall be governed by the principles of the common law," as interpreted in the light of "reason and experience." As described, the only other federal

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[9] In a case where a husband suspected of his wife's murder refused the investigating district attorney's request to waive his wife's attorney-client or psychotherapist-patient privilege, the district attorney successfully petitioned the probate court to remove the husband as executor on the ground that he could not make a disinterested decision as to waiver. *District Attorney v. Magraw*, 628 N.E.2d 24 (Mass. 1994).

[10] *Massachusetts v. Goldman*, 480 N.E.2d 1023, 1029 n.8 (Mass.), *cert. denied*, 474 U.S. 906 (1985); *In re a John Doe Grand Jury Investigation*, *supra*, 562 N.E.2d at 71. Other courts, however, have refused to negate the privilege despite the asserted needs of criminal defendants. *Mayberry v. Indiana*, *supra*; *People v. Modzelewski*, *supra*; *Arizona v. Macumber*, *supra*; *South Carolina v. Doster*, *supra*.

[11] *See also*, *Weinstein's Federal Evidence* (2d ed.) § 412.03[4], citing cases holding that, in certain narrowly defined circumstances in rape prosecutions, constitutional concerns may require admission of evidence concerning the victim's past sexual conduct, despite state laws barring such evidence.

court of appeals holdings on the issue, as well as the overwhelming majority of state court holdings, confirm that the attorney-client privilege survives the client's death.[12] State case law is supported by numerous state statutes providing that the privilege may be claimed after death by the client's personal representative.[13] Obviously, these statutes rest on the assumption that the privilege survives death. "[I]t is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" *Jaffee v. Redmond*, *supra*, 116 S. Ct. at 1930.

The court of appeals argues that, because these statutes are consistent with the notion that the privilege expires when the estate is closed, they involve only testamentary

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[12] Dicta in federal court opinions are to the same effect. *Colonial Gas Co. v. Aetna Casualty & Surety Co.*, 144 F.R.D. 600, 604 (D. Mass. 1992); *Dixson v. Quarles*, 627 F. Supp. 50, 53 (E.D. Mich.), *aff'd mem.*, 781 F.2d 534 (6th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986).

[13] "In general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client (either an executor or administrator)." *Restatement (Third) of the Law Governing Lawyers*, § 127, Comment c (Proposed Final Draft, March 29, 1996). That view also is reflected in the Model Code of Evidence, Rule 209(c)(1), and the Uniform Rules of Evidence, Rule 502(c). *See also* the discussion of state statutes by Judge Tatel in his dissent. Pet. App. 16a-17a. State statutes allowing the personal representative of the deceased to assert the privilege include: Ala. R. Evid., Rule 502; Alaska R. Evid. 503; Ark. Code Ann. § 16-41-101, Rule 502; Cal. Evid. Code § 953; Del. Code Ann., Del. R. Evid. 502; Fla. Stat. Ann. § 90.502; Haw. Rev. Stat. § 626-1, Rule 503; Idaho R. Evid. 502; Kan. Stat. Ann. § 60-426; Ky. R. Evid. 503; La. Code Evid. Ann. art. 506; Me. R. Evid. 502; Miss. R. Evid. 502; Neb. Rev. Stat. § 27-503; Nev. Rev. Stat. § 49.105; N.H. R. Evid. 502; N.J. Stat. Ann. 2A;84A, App. A, N.J. R. Evid. 504; N.M. Stat. Ann., N.M. R. Evid. 11-503; N.D. R. Evid. 502; Oh. Rev. Code Ann. § 2317.02; 12 Okla. Stat. Ann. § 2502; Or. Rev. Stat. § 40.225; S.D. Codified Laws § 19-13-4; Tex. R. Civ. Evid. 503 and Tex. R. Crim. Evid. 503; Vt. Stat. Ann., Vt. R. Evid. 502; Wis. Stat. Ann. § 905.03.

matters and thus do not indicate that the privilege survives death in a criminal context. Pet. App. 4a. Were the statutes generally so limited, one would expect to find language to that effect in them. But none of these statutes says that it is inapposite as to criminal matters or that the privilege expires when the estate closes. Certainly, the Arkansas statute, which governs Mr. Foster's still-open estate, does not.

d. The privilege's purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It misreads human nature to conclude that the typical client cares only about his or her own fate while alive, and thus will talk freely to an attorney despite knowing that the conversation may be used posthumously to damage his or her reputation or used in criminal proceedings against family or close associates. Where the client is elderly, severely ill or has other reasons to believe that death is near, this conclusion is particularly contrary to reason and common experience.

The principal support for the court of appeals' view derives from academic commentators. One text argues that "[o]ne would have to attribute a Pharaoh-like concern for immortality to suppose that the typical client has much concern for how posterity may view his communications." 24 Charles Alan Wright & Kenneth A. Graham, Jr., *Federal Practice and Procedure* § 5498, at 484 (1986). This far too dismissive comment overlooks the fact that many persons adhere to more contemporary, meaningful faiths that place great store in the value of a good name and concern for the well-being of family, friends and neighbors. Such beliefs and cares are hardly a relic of ancient times. Rather, reason and experience tells us that, despite the glib, cynical observations of some commentators, concerns about reputation and others after

death permeate our society, particularly among the aged and ill.

An elderly or terminally-ill person could well seek a lawyer's advice not only about preservation of his or her estate, but also about possible criminal activities of children, a spouse or close associates. But under the court of appeals' decision, such a person could not talk to a lawyer with an assurance of confidence about, for example, the suspected drug involvement of a child. Reason and experience teach that the court of appeals was simply wrong in supposing that, while people have a "motive to preserve their estates" to protect their heirs from economic loss, they do not care at least as much about potential criminal penalties inflicted on loved ones after their death. Pet. App. 6a.

There is also the very real concern that many people have for their own reputations—a concern that does not turn on whether some later proceeding is civil or criminal. The court of appeals expressed "doubt" that an individual's "residual" interest in post-mortem reputation "will be very powerful," suggesting that "the individual may even view history's claims to truth as more deserving." Pet. App. 7a. But anyone familiar with memoirs knows that most people who speak "for history" tend to choose words with extreme care. "Most public servants' memoirs turn out to be self-serving exercises in which their political decisions are retrospectively interpreted in the best possible light." [14] A respected recent memoirist has described how he went through his final draft "with a fine tooth comb" to assure that, while being honest, he would "not, at the same time, be hurtful," because he knew "everything you say will be in print forever." [15] The attorney-

[14] "We Can All Learn from McNamara's Memoirs," New York Times (April 13, 1995) at p. A24.

[15] "Colin Powell Talks About His Family, 'the Producers' and the Making of a Memoir," Chicago Tribune (Aug. 26, 1996) at p. C3. If we may be so bold, we also submit that judges carefully write opinions with a view to the opinions of posterity.

client privilege is designed to ensure that people, when speaking with counsel, do so with candor and need not edit their statements with a "fine tooth comb." [16]

e. This Court has long recognized that the grand jury's right to "every man's evidence" does not extend to "those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972). Where a privilege is qualified and thus subject to a balancing test, the need for the evidence in particular criminal cases may be a factor considered in the balance. *United States v. Nixon*, 418 U.S. 683, 711-12 (1974); *Branzburg, supra*, 408 U.S. at 708. But there is no precedent for subjecting the absolute privileges

[16] The conclusion that persons do not care about their post-death reputations and the fate of close associates is disputed by the facts of this case. Mr. Foster was a man who cared deeply about his reputation and the well-being of others. Judge Tatel has quoted from his May 1993 commencement speech about the value of reputation to him. Pet. App. 23a. Both Independent Counsel Fiske and even Independent Counsel Starr (who now generally minimizes the concern for posthumous reputation) concluded that attacks on Mr. Foster's reputation and others could have contributed to the depression that caused him to take his own life. Pet. App. 23a; Report of the Independent Counsel In Re Vincent W. Foster, pp. 8-17 (June 30, 1994); Report on the Death of Vincent W. Foster, Jr., by the Office of Independent Counsel In Re: Madison Guaranty Savings & Loan Association, pp. 105-10 (Oct. 10, 1997). Mr. Fiske also relates how Mr. Foster, upset that a colleague was reprimanded in the Travel Office matter, sought instead to take the blame himself. Mr. Foster's now famous note—likely written within hours of his visit to Mr. Hamilton—says, in obvious reference to himself, that in Washington "ruining people is considered sport." The note also complains that "the public will never believe the innocence of the Clintons and their loyal staff." *Id.* at Exhibit 5.

The court of appeals decision disregards Mr. Foster's concerns for his reputation and associates and would disclose notes of a conversation he sought to ensure was privileged. The decision thus is not only, as Judge Tatel said, a "fundamental blow" to the privilege generally, it is also a direct attack on Mr. Foster's wishes and intentions.

recognized at common law to a balancing test in a criminal cases.[17]

The balancing approach the court of appeals adopted is particularly damaging to the attorney-client privilege because potential violations of the law (including those by persons who survive the client's death) are a frequent subject of attorney-client conversations. To a much greater extent than any other type of privileged communication, attorney-client communications will be chilled and the purpose of the privilege undermined if those communications are subject to disclosure in criminal prosecutions. And as observed, if such communications are admissible in criminal proceedings, confidentiality effectively would be destroyed and little reason would remain to withhold the evidence from civil proceedings. In criminal as well as civil cases, the attorney-client privilege is so important in our system of justice that it "should not yield either before or after the client's death to society's interest, as legitimate as we recognize that interest is, in obtaining every man's evidence." *In re a John Doe Grand Jury Investigation, supra*, 562 N.E.2d at 71.

2. The Work Product Issue

The Court should also grant review of the important work-product privilege issue. In *Upjohn v. United States, supra*, this Court said that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements

[17] The privilege for marital communications survives death. *Curran v. Pasek*, 886 P.2d 272 (Wyo. 1994); *Merrill v. William Ward Ins. Co.*, 622 N.E.2d 743 (Ohio Ct. App. 1993); *Georgia Int'l Life Ins. Co. v. Boney*, 228 S.E.2d 731 (Ga. Ct. App. 1976). The patient-physician and patient-psychotherapist privileges, while not recognized at common law, have also been held to survive the patient's death. *Leritz v. Koehr*, 844 S.W.2d 583 (Mo. Ct. App. 1993); *Williams v. Kentucky*, 829 S.W.2d 942 (Ky. Ct. App. 1992); *Rittenhouse v. Superior Court*, 1 Cal.Rptr. 2d 595 (Cal. Ct. App. 1991); *Sims v. State*, 311 S.E.2d 161 (Ga. 1984).

is particularly disfavored because it tends to reveal the attorney's mental processes." 449 U.S. at 399. In so stating, the Court was explaining *Hickman v. Taylor*, 329 U.S. 495 (1947), which accorded work product privilege protection to an attorney's notes of oral statements by a potential witness.

In *Upjohn*, the Court noted a conflict in the circuits on the issue whether, under *Hickman*, "*no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses," or whether "such documents will be discoverable only in a 'rare situation.'" 449 U.S. at 401 (emphasis in original), citing *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973) (absolute protection); and *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) (disclosure in a "rare situation"). While the Court did not resolve that conflict, the *Upjohn* decision provides no support for the court of appeals' conclusion that an *ordinary* showing of necessity is sufficient to obtain disclosure of attorney notes.

The court of appeals concedes that, where an attorney takes notes of "interviews conducted as part of a litigation-related investigation," the facts elicited "necessarily reflect[] a focus chosen by the lawyer." Pet. App. 13a. The court of appeals also concedes that, in these circumstances, the Fourth and Eleventh Circuit accord the attorney's notes—including factual material—"the virtually absolute protection that the [work product] privilege gives to the attorney's mental impressions." Pet. App. 13a, citing *In re Allen*, 106 F.3d 582, 607-08 (4th Cir.) *rehearing en banc denied*, 199 F.3d 1129 (4th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3298 (U.S. Oct. 10, 1997) (No. 97-642);[18] *Cox v. Administrator, U.S. Steel*, 17 F.3d 1386, 1422 (11th Cir.), *modified on rehearing on other grounds*, 30 F.3d 1347 (11th Cir.),

[18] Certiorari was denied on January 12, 1998, after the filing of the typewritten version of this petition.

cert. denied, 513 U.S. 1110 (1994). The court of appeals, however, attempted to distinguish these decisions on the ground that the interview in this case was "a preliminary one initiated by the client," and on that basis ruled that factual material in the notes was producible upon a showing that meets the "ordinary Rule 26(b)(3) standard" of necessity and unavailability of alternative evidence. Pet. App. 13a-14a.

The distinction between initial and later interviews is spurious. As Judge Tatel noted, "[n]o lawyer approaches a client's problems with a 'blank slate.' . . . Even at a first meeting, regardless of who initiates it, lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients." Pet. App. 30a.

Mr. Hamilton came to the meeting with Mr. Foster with considerable experience in representing clients in highly-publicized, "political" cases. As many attorneys do, he prepared for the "initial interview"; the record shows that he had read and taken notes on the White House's report on the Travel Office matter that was the subject of the interview. Pet. App. 40a, 41a. He thus was both knowledgeable and focused. To adopt a conclusive presumption that initial interview notes do not reflect the lawyer's mental impressions ignores both the reality of the practice of law and the reality of this case.

As Judge Tatel observed (Pet. App. 31a), the notes themselves demonstrate that Mr. Hamilton exercised his judgment during the interview. "In two hours, he created only three pages of notes," which were not verbatim but contained only what "he thought significant, omitting everything else." The notes, Judge Tatel said, bear various markings ("check marks and question marks") and "clearly represent the opinions, judgments, and thought processes of counsel." *Id.* Chief Judge Penn had reached the same conclusion for the district court. Pet. App. 42a.

The decision of the court of appeals is important and warrants review because it discourages attorneys from taking notes at initial client and witness interviews. It

conflicts with the Fourth and Eleventh Circuit decisions cited by the court of appeals, as well as the Third and Eighth Circuit decisions cited in *Upjohn*, all of which hold that attorneys' notes of witness interviews are not subject to production on an ordinary showing of necessity. *In re Allen, supra*; *Cox v. Administrator, U.S. Steel, supra*; *In re Grand Jury Proceedings, supra*; and *In re Grand Jury Investigation, supra*. More importantly, the opinion conflicts with *Upjohn*. These decisions cannot be convincingly distinguished on the basis that they did not involve initial client interviews, for the rationale of the court of appeals' opinion applies to both initial client and witness interviews.

The court of appeals' decision also is wrong as a matter of law. The issue is not, as the court of appeals argued, whether the attorney in an initial interview attempts to "encourage a fairly wide-ranging discourse." Pet. App. 13a. Rather, the issue is which portions of that "discourse" the attorney chooses to record and the words the attorney chooses to accomplish this. It is these choices the attorney's notes reflect and the work product privilege protects. *Upjohn v. United States, supra*, 449 U.S. at 399.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 31, 1997

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued June 20, 1997 Decided August 29, 1997

No. 97-3006

IN RE: SEALED CASE

Consolidated with

No. 97-3007

Appeals from the United States District Court
for the District of Columbia
(No. 95ms00446)
(No. 95ms00447)

Before: WALD, WILLIAMS and TATEL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WILLIAMS.

Dissenting opinion filed by *Circuit Judge* TATEL.

WILLIAMS, *Circuit Judge*: This case arises out of a grand jury investigation into the firing of White House travel office employees. The Office of Independent Counsel obtained grand jury subpoenas for notes of a conversation between a now-deceased White House official and his private attorney. The attorney and his law firm moved in district court to quash the subpoenas, claiming successfully that the notes were protected by the attorney-client privilege and by the work-product privilege. Because we think

the district court read both privileges too broadly, we reverse and remand for further proceedings.

Attorney-Client Privilege

The attorney-client privilege applies to grand jury proceedings. Fed. R. Evid. 501, 1101(c) & (d). The parties agree that the communications at issue would be covered by the privilege if the client were still alive. The Independent Counsel, however, argues that the client's death calls for a qualification of the privilege. We agree.

Rule 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as . . . interpreted by the courts . . . in the light of reason and experience." Fed. R. Evid. 501; see also *Jaffee v. Redmond*, 116 S. Ct. 1923, 1927 (1996). We take this to be a mandate to the federal courts to approach privilege matters in the way that common law courts have traditionally addressed any issue—observing precedent but at the same time trying, where precedents are in conflict or not controlling, to find answers that best balance the purposes of the relevant doctrines.

Courts have generally assumed that the privilege survives death. See Simon J. Frankel, "The Attorney-Client Privilege After the Death of the Client," 6 Geo. J. Legal Ethics 45, 47 (1992) (citing cases). Modern evidence codes often provide that the personal representative of a deceased client may assert the privilege. See Restatement (Third) of the Law Governing Lawyers § 127 Reporter's Note, comment c (Proposed Final Draft, March 29, 1996) ("Restatement"). And courts have applied the privilege after death in both grand jury proceedings and criminal trials. See, e.g., *John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990); *People v. Pena*, 198 Cal. Rptr. 819, 829 (Ct.App.2d 1984); *State v. Doster*, 284 S.E.2d 218 (S.C. 1981).

Yet most judicial references to the persistence of the privilege after death appear to have occurred only as the prelude to application of a well recognized exception—for disputes among the client's heirs and legatees.[1] See Frankel, *supra*, at 58 n.56 (95% of cases examined (380 out of 400) were testamentary disputes). Thus holdings actually *manifesting* the posthumous force of the privilege are relatively rare. See McCormick on Evidence § 94, at 348 ("the operation of the privilege has in effect been nullified in the class of cases where it would most often be asserted after death."). And such cases as do actually apply it give little revelation of whatever reasoning may have explained the outcome.

The Supreme Court's decision in *Glover v. Patten*, 165 U.S. 394 (1897), is cited for the proposition that the privilege survives death. See, e.g., *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812, 814 (9th Cir. 1942). In fact, however, *Glover* is simply a typical case that asserts the general principle of the privilege's survival after death, but finds it inapplicable to disputes among persons "claiming under the client." 165 U.S. at 407. Even the Court's endorsement of the privilege's survival in ordinary circumstances was rather tepid. It observed that "such communications might be privileged if offered by third persons to establish claims against an estate," *id.* at 406, and quoted *Russell v. Jackson*, 9 Hare 387, 393, 68 Eng. Rep. 558, 560 (1851), which stated only that "the privilege does not in all cases terminate with the death of the party," and belongs to "parties claiming under the

[1] The exception applies only when the parties are claiming "through the client," not when a party claims against the estate. Some have justified the exception as furthering the client's intent, while others have explained that in a will contest, the question of who may assert the privilege cannot be resolved without resolving the merits of the claims, and thus it is preferable to permit neither to assert the privilege. See 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 197, at 377-78 (2d ed. 1994). As neither justification bears on our analysis, we need not choose between them.

client as against parties claiming adversely to him." *Id.*, quoted in *Glover*, 165 U.S. at 407. Compare Cal. Evid. Code § 954, comment (1997) ("[T]here is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged."). In short, there is little by way of judicial holding that affirms the survival of the privilege after death, and the framing of the posthumous privilege as belonging to the client's estate or personal representative both suggests that the privilege may terminate on the winding up of the estate and reflects a primary focus on civil litigation.[2]

Although courts often cite as axiomatic the proposition that the privilege survives death, commentators have, with one distinguished exception, generally supported some measure of post-death curtailment. The exception, Wigmore, proclaimed that there was "no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate." 8 Wigmore on Evidence § 2323, at 630-31 (McNaughton Rev. 1961). But others have sharply criticized his view. The most emphatic statement is that of Wright & Graham, who wrote, "One would have to attribute a Pharaoh-like concern for immortality to suppose that the typical client has much concern for how posterity may view his communications." 24 Charles A. Wright & Kenneth W. Graham, Federal Practice and Procedure: Evidence § 5498, at 484 (1986); see also Restatement § 127, comment d ("Permitting such dis-

[2] Our dissenting colleague evidently reads the provisions allowing the personal representative of the deceased to claim the privilege as implying that the privilege survives death without exception (other than the standard testamentary one). See Dissent at 3. But the inference is far from clear. Vesting the privilege in the personal representative is plainly consistent with its terminating at the winding up of the estate, when its function of protecting the decedent's transmission of his or her property to the intended beneficiaries, free from claims based on statements to counsel, has run its course. Such vesting does not remotely suggest concern over anyone's criminal responsibility.

closure would do little to inhibit clients from confiding in their lawyers")[3]; 1 McCormick on Evidence § 94, at 350 (4th ed. 1992) (terminating the privilege at death "could not to any substantial degree lessen the encouragement for free disclosure"); 2 Mueller & Kirkpatrick § 19, at 380 ("Few clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense").

Presumably depending on their confidence in their judgments as to the residual chilling effect on clients commentators have proposed a range of substitute rules. Some have embraced Learned Hand's view that the privilege should not apply at all after death, see, e.g., ALI Proceedings, 1942, quoted in 24 Wright & Graham § 5498, at 485; 1 McCormick on Evidence § 94, at 350, while the American Law Institute has suggested a general balancing test, proposing that

> a tribunal be empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. The tribunal could balance the interest in confidentiality against any exceptional need for the communication. The tribunal also could consider limiting the proof or sealing the record to limit disclosure.

Restatement § 127, comment d.

The justification for the attorney-client privilege has largely been an instrumental one, resting on a belief that it greatly facilitates—perhaps is essential to—the provision of legal advice. Such assistance "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). In addition, some have

[3] Drafts of portions of the Restatement (Third) of the Law Governing Lawyers, including § 127, have been tentatively approved by the American Law Institute's Council and membership but have not yet been finally adopted.

spoken of privacy concerns, see Frankel, *supra*, at 53-54 & nn.41-45 (citing commentators), but it seems fair to say that these have played at best a secondary role. In any event, because the privilege obstructs the truth-finding process, it is, we have said, to be narrowly construed. *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 675 (D.C. Cir. 1979).

The object, presumably, is to maximize the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes. Even if the focus were solely on truth-seeking, dispensing with the privilege altogether would presumably have negative results. Any rule qualifying the privilege may in at least some cases (once it is adopted) cause some clients to confide less in their attorneys; the communication that is stillborn can never be dislclosed. And abrogation of the privilege would clearly impair the provision of legal services. Except to the extent that limits on the privilege *actually* chill the hoped-for communications, however, its application renders judicial proceedings less accurate.

Wright & Graham's supposition that favoring survival of the privilege after death requires imputing a "Pharaoh-like concern" to clients may be a bit of an exaggeration. But it is surely true that the risk of post-death revelation will typically trouble the client less than pre-death revelation. The question is how much less, and the answer seems likely to depend on the context. On one side, criminal liability will have ceased altogether. Civil liability, on the other hand, characteristically continues, and the same impulses that drive people to provide for their families in life clearly create a motive to preserve their estates thereafter.[4] In the middle are reputational concerns. To the

[4] The impulse would also apply to a corporation with which a decedent has been involved, but the privilege there would characteristically belong to the corporation. See, e.g., *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1977). Thus rules

extent that concern over reputation arises from an interest in the sort of treatment a person will receive from others —ranging from mundane matters such as extension of credit to more subtle ones such as how one will be greeted at social events—it ends with death. But there are aspects of after-death reputation that will concern a person while alive—the value to surviving family of being related to (say) an honorable and distinguished person, and the value of one's posthumous reputation simpliciter (the pure Pharaoh effect). In the sort of high-adrenalin situation likely to provoke consultation with counsel, however, we doubt if these residual interests will be very powerful; and against them the individual may even view history's claims to truth as more deserving. To the extent, then, that any post-death restriction of the privilege can be confined to the realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil.

The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information; indeed, his availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to truth. American Bar Association's Committee on the Improvement of the Law of Evidence, quoted in 8 Wigmore § 2299, at 579. Thus the fewer, and the more questionable the remaining sources (e.g., because of witnesses' interest or bias), the greater the relative value of what the deceased has told his lawyer. Although witness unavailability alone would not justify qualification of the privilege, we think that unavailability through death, coupled with the non-existence of any client concern for criminal liability after death,

regarding termination of the privilege on the biological death of the client are largely irrelevant. For a discussion of the privilege and organizational successors, see 24 Wright & Graham § 5499; 2 Mueller & Kirkpatrick § 200; see also *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (corporate bankruptcy trustee controls and therefore may waive the privilege).

creates a discrete realm (use in criminal proceedings after death of the client) where the privilege should not automatically apply. We reject a general balancing test in all but this narrow circumstance.

In rejecting two rather ambiguous limitations for privileges—the so-called "control-group" qualification of the attorney-client privilege, *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and a "balancing" test for the psychotherapist-patient privilege, *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996)—the Supreme Court observed, "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393; *Jaffee*, 116 S. Ct. at 1932. Accordingly, to the extent that the commentators may be read as urging some sort of generalized balancing test for posthumous limitations of the privilege, we disagree. We thus embrace the arguments for such an exception only within the discrete zone of criminal litigation. While we believe that a case-by-case balancing is appropriate *within* that realm, we see no basis for any further exception (apart of course from the long-established exception for litigation among those claiming under the decedent).

Even such a discrete exception, of course, complicates what the lawyer must tell an anxious client about the confidentiality of a prospective conversation. But in assessing that incremental complication, we recognize that even now any belief in an absolute attorney-client privilege is illusory. See Edna S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 3 (1997) ("Many communications that clients and lawyers mistakenly believe are privileged in fact are not."). First, even communications made in confidence in the search for legal advice are unprotected if they relate to future illegality (the "crime-fraud exception"). See Wright & Graham § 5501. The dissent contends that a client can be certain whether his communications will fall under the crime-

fraud exception, but this underestimates its slipperiness. We have acknowledged that "there may be rare cases . . . in which the attorney's fraudulent or criminal intent defeats a claim of privilege even if the client is innocent," *In re Sealed Case*, 107 F.3d 46, 49, n.2 (D.C. Cir. 1997), citing *In re Impounded Case (Law Firm)*, 879 F.2d 1211, 1213-14 (3d Cir. 1989), which indeed applies the exception in the face of client innocence. And the exception applies not only to crimes and fraud, but to other intentional torts. See *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (applies to "crime, fraud or other misconduct"); see also *Irving Trust Co. v. Gomez*, 100 F.R.D. 273, 277 (S.D.N.Y. 1983) (communications unprotected where client who wrongfully deprived another of use of his bank funds reasonably should have known that such conduct constituted "fraud or any other intentional tort"); *Diamond v. Stratton*, 95 F.R.D. 503, 505 (S.D.N.Y. 1982) (no protection where communication in furtherance of intentional infliction of emotional distress).

There is also the ubiquitous exception for litigation between persons claiming under the decedent—although in many contexts (including most imaginable conversations about the White House travel office firings) the improbability of its application would be readily apparent at the outset of the client-lawyer communication. Although this exception is sometimes justified as reflecting the decedent's likely intent, see note 1 *supra*, it does not perfectly track that idea; a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed. Further, in some states the privilege does not survive the winding up of an estate, Cal. Evid. Code § 954, and in others it may not do so, see Restatement § 127, Reporter's Note, comment c; 24 Wright & Graham § 5498, at 485.[5] Finally, even courts

[5] The record reveals nothing of the status of the decedent's estate in this case, and the Independent Counsel makes no claim based on its status.

applying the privilege to bar statements of a decedent from a criminal trial have acknowledged that a defendant might in some cases have a constitutional right to offer statements that exonerate him. *John Doe Grand Jury Investigation*, 562 N.E.2d at 71-72 (privilege survives death except where mandated by constitutional considerations); *State v. Doster*, 284 S.E.2d 218, 220 (S.C. 1981) (court upholds exclusion of communications, saying that the defendant was denied not the right to establish his defense but merely "the license to fish into privileged communications"). Compare *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (state interest in anonymity for juvenile offender cannot trump defendant's right of confrontation).

While some of these exceptions are within the client's control, that cannot be said of all. Thus a lawyer who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit. (Given the likely impatience of the client with what may seem legalistic detail, the oversimplification may be justifiable; we need not say.) Accordingly the incremental uncertainty introduced by this exception is hardly devastating. And admission of an exception limited to post-death use in criminal proceedings produces none of the murkiness that persuaded the Court in *Upjohn* and *Jaffee* to reject the limitations proposed there.

Even in the realm of criminal proceedings (including grand jury proceedings), this exception should apply only to communications whose relative importance is substantial. Thus, the statements must bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence. Where there is an abundance of disinterested witnesses with unimpaired opportunities to perceive an unimpaired memory, there would normally be little basis for intrusion on the intended confidentiality. This should limit release to contexts where not only is the risk of chilling effect slight but

keeping the communications secret would be quite costly. Cf. *In re Sealed Case*, 116 F.3d 550, 577 (D.C. Cir. 1997) (need shown where "it is likely that the subpoenaed materials contain important evidence and . . . this evidence, or equivalent evidence, is not practically available from another source").

Review by the district court *in camera* may play a role in application of this exception. Where the proponent has offered facts supporting a good faith reasonable belief that the materials may qualify for the exception (a standard plainly met here by the Independent Counsel), the district court should in its sound discretion examine the communications to see whether they in fact do. See *United States v. Zolin*, 491 U.S. 554, 570-72 (1989). To the extent that the court finds an interest in confidentiality, it can take steps to limit access to these communications in a way that is consonant with the analysis justifying relaxation of the privilege.[6] See 2 Mueller & Kirkpatrick § 199, at 380-81.

Work-Product Privilege

The work-product privilege created by *Hickman v. Taylor*, 329 U.S. 495 (1947), may in some cases protect more material than the attorney-client privilege, because it "protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share." *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982). The "opinions, judgments, and thought processes of counsel" are generally protected, and the person seeking them must show extraordinary justification. *Id.* at 809-10. For relevant, nonprivileged facts, however, their being embodied in work product

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[6] In considering the interest in confidentiality, the court may in appropriate circumstances protect innocent third parties from disclosure as well. Here, of course, Federal Rule of Criminal Procedure 6(e)'s provision of secrecy for grand jury proceedings gives additional protection.

merely shifts the standard presumption in favor of discovery, so that they are discoverable where the person seeking discovery satisfies the standard of Rule 26(b)(3) of the Federal Rules of Civil Procedure, which requires a showing of "substantial need" and "the inability to obtain the substantial equivalent of the information . . . from other sources without 'undue hardship.'" *Id.* at 809 n.59 (identifying that language as an expression of *Hickman*'s "adequate reasons" formula).[7]

The district court found that the notes were protected by the work-product privilege because they "reflect the mental impressions" of the attorney. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Court observed that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Id.* at 399. But the Court did not decide whether factual elements embodied in such notes should be accorded the virtually absolute protection that the privilege gives to the attorney's mental impressions. *Id.* at 401. Indeed, its reasoning seems to presuppose that such notes are analytically divisible; in refraining from formulation of a specific test, the Court said that the notes in question represented *either* communications protected by the attorney-client privilege (which was applicable, in contrast to the present case) *or* mental impressions protected by work-product privilege. *Id.*; see also *United States v. Paxson*, 861 F.2d 730, 736 (D.C. Cir. 1988) (noting that *Upjohn* did not formulate a test for factual matter embodied in lawyer's notes on conversations with

[7] Because of this apparent identity between the common law standard and that of Rule 26(b)(3), it appears to make little difference whether Federal Rule of Civil Procedure 81(a)(3) merely makes Rule 26 applicable to the procedure of litigation over grand jury subpoenas or also defines the substance of the privilege. See *In re Sealed Case*, 676 F.2d at 808 n.49.

witnesses and finding in the case before it no "strong showing" of necessity).

In *In re Sealed Case*, 856 F.2d 268 (D.C. Cir. 1988), a party asked Securities and Exchange Commission lawyers on deposition for their *recollections* of witness interviews. Citing *Upjohn*, 449 U.S. at 401-02, we said that "[a]s the work product sought here is based on oral statements from witnesses, a far stronger showing is required than the 'substantial need' and 'without undue hardship' standard applicable to discovery of work-product protected documents and other tangible things." *Sealed Case*, 856 F.2d at 273. And in *Allen v. McGraw*, 106 F.3d 582, 607-08 (4th Cir. 1997), the court upheld the privilege as to the *contested* portion of an attorney's memo of an interview, observing that those portions "tend[ed] to indicate the focus of [the lawyer's] investigation, and hence, her theories and opinions regarding this litigation." See also *Cox v. Administrator, U.S. Steel*, 17 F.3d [illegible], 1422 (11th Cir. 1994).

All three of the above cases involved interviews conducted as part of a litigation-related investigation. (Our *Sealed Case*, 858 F.2d 268, in addition involves unrecorded recollections of interviews and was thus not within the coverage of Rule 26(b)(3). Accordingly, as *Allen* reasoned, the facts elicited necessarily reflected a focus chosen by the lawyer. Here the interview was a preliminary one initiated by the client. Although the lawyer was surely no mere potted palm, one would expect him to have tried to encourage a fairly wide-ranging discourse from the client, so as to be sure that any nascent focus on the lawyer's part did not inhibit the client's disclosures.

Accordingly, unless the general possibility that purely factual material may reflect the attorney's mental processes (either in questioning or in recording) is enough to shroud all lawyers' notes in the super-protective envelope

reserved by Rule 26(b)(3) for "mental impressions," we think such material should be reachable when true necessity is shown. Where the context suggests that the lawyer has not sharply focused or weeded the materials, the ordinary Rule 26(b)(3) standard should apply.

Our brief review of the documents reveals portions containing factual material that could be classified as opinion only on a virtually omnivorous view of the term. We cannot therefore accept the district court's conclusion that they are protected in their entirety.

* * *

We reverse and remand the case to the district court to reexamine the documents in light of this opinion. The documents may be redacted so that the grand jury receives only those portions that are protected by neither the attorney-client nor the work-product privilege.

So ordered.

TATEL, *Circuit Judge*, dissenting: * Offered no persuasive reason to depart from the common law's posthumous protection of the attorney-client privilege and appreciating its importance in encouraging "full and frank communication" by clients with their lawyers, I would affirm the distirct court's judgment that the privilege protects the attorney's notes of his conversation with his now-deceased client. I therefore need not consider whether the notes are attorney work product.

I

Finding its first expression in the courts of Elizabethan England, *see* 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961), and accepted in the courts of the United States from the earliest days of the republic, *see, e.g., Chirac v. Reinicker*, 24 U.S. 280, 294 (1826), the attorney-client privilege is the oldest privilege for confidential communications known to the common law. Extending well beyond protecting the interests of clients, the privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promte[s] broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Fully informed lawyers participating in the legal system as officers of the court sharpen the adversary process, thus improving the quality of judicial decisionmaking and the development of the law. By encouraging individuals to consult lawyers and disclose to them candidly and fully, the attorney-client privilege also allows the nation's legal profession to help individuals understand their legal obligations and facilitate their voluntary compliance with them. Such voluntary compliance is particularly important to a free society which neither has nor should want sufficient law enforce-

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* In order to preserve the secrecy of the grand jury proceedings, selected portions of this dissent have been deleted from the published opinion.

ment resources to search out and punish every violation of every law. *See id.; see also Trammel v. United States,* 445 U.S. 40, 51 (1980); *In the Matter of a John Doe Grand Jury Investigation,* 562 N.E.2d 69, 70 (Mass. 1990).

The attorney-client privilege recognizes that sound legal advice does not "spring from lawyers' heads as Athena did from the brow of Zeus," *In re Sealed Case,* 737 F.2d 94, 99 (D.C. Cir. 1984), but instead depends "upon the lawyer's being fully informed by the client." *Upjohn,* 449 U.S. at 389. Although on occasion the attorney-client privilege can "ha[ve] the effect of withholding relevant information from the fact-finder," *Fisher v. United States,* 425 U.S. 391, 403 (1976), courts sustain the privilege in individual cases to accomplish its larger systemic benefits —the greater law compliance and fairer judicial proceedings resulting from the "sound legal advice [and] advocacy" the privilege promotes. *Upjohn* at 389.

Like the spousal, priest-penitent, and psychotherapist-patient privileges, the attorney-client privilege is " 'rooted in the imperative need for confidence and trust.' " *Jaffee v. Redmond,* 116 S. Ct. 1923, 1928 (1996) (quoting *Trammel,* 445 U.S. at 51). As the Supreme Court recognized more than a century ago, the assistance of counsel "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn,* 128 U.S. 464, 470 (1888). Because individuals frequently seek legal counsel concerning embarrassing, disgraceful, or criminal conduct, "the mere possibility of disclosure" of communications about such subjects may "impede development of the confidential relationship," *Jaffee,* 116 S. Ct. at 1928, thereby eroding the substantial benefits to the justice system afforded by well-informed legal counsel. Lawyers who have represented clients in sensitive matters know the key words to full disclosure:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. Now, please tell me the whole story.

Since at least the mid-nineteenth century, the common law has protected the attorney-client privilege after a client's death. *See, e.g., Hart v. Thompson's Executor,* 15 La. 88, 93 (1840) (upholding privilege after client's death); SIMON GREENLEAF, 1 TREATISE ON THE LAW OF EVIDENCE 310 (1850) (privilege not affected by death of client). Other than in testamentary disputes, for which there exists a well-established and independently justified exception not applicable to the case before us, *see, e.g., Glover v. Patten,* 165 U.S. 394, 406-08 (1897), both state and federal courts have consistently followed the common law rule, whether the privilege is claimed in civil litigation, *see e.g., United States v. Osborn,* 561 F.2d 1334 (9th Cir. 1977); *Baldwin v. Commissioner of Internal Revenue,* 125 F.2d 812, 814 (9th Cir. 1942); *People v. Pena,* 198 Cal. Rptr. 819, 828 (Cal. Ct. App. 1984); *Lamb v. Lamb,* 464 N.E.2d 873, 877 (Ind. Ct. App. 1984); *Bailey v. Chicago, Burlington & Quincy R.R. Co.,* 179 N.W.2d 560, 564 (Iowa 1970), or in criminal proceedings, *see, e.g., State v. Macumber,* 544 P.2d 1084, 1086 (Ariz. 1976); *John Doe Grand Jury Investigation,* 562 N.E.2d at 72; *People v. Modzelewski,* 611 N.Y.S.2d 22, 23 (N.Y. App. Div. 1994); *Cooper v. State,* 661 P.2d 905, 907 (Okla. 1983); *State v. Doster,* 284 S.E.2d 218, 219 (S.C. 1981); *see also* 8 WIGMORE, EVIDENCE § 2323 & n.2 (citing additional cases). Incorporated in the model codes of evidence, *see id.* § 2292 n.2 (quoting Uniform Rule of Evidence § 26(1)); MODEL CODE OF EVIDENCE, Rule 209(c)(i) (1942), adopted by the Supreme Court's Advisory Committee, *see* 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 521 (discussing Standard 503), and codified by at least twenty state legislatures, *see, e.g.,* GREGORY P. JOSEPH & STEPHEN A. SALZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES

§ 24.2 (1992) (citing 19 state codes); CAL. EVID. CODE § 953 (West 1995), the common law rule admits "no exception" that outside the testamentary context, the attorney-client privilege survives the client's death. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. d (Proposed Final Draft No. 1, 1996); *see also id.* (citing additional authorities); EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 234 (3d ed. 1997) ("The duration of the privilege, once it attaches, persists unless the lawyer is released by the client. Upon the death of the client, no release is possible. Hence death should seal the lawyer's lips forever.").

Although rarely articulated, the rationale underlying the common law rule makes sense. By preserving the privilege after the client's death, the law ensures that the privacy afforded those who confide in counsel extends to those who would otherwise take their secrets to the grave. The common law rule thus encourages individuals to seek legal advice, bringing the benefit of such consultation to themselves, the legal system, and society. *See Fisher*, 425 U.S. at 403 ("As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."). As Wigmore explains:

> The subjective freedom of the client, which it is the purpose of the privilege to secure . . ., could not be attained if the client understood that, when the relation ended or even after the client's death, the attorney could be compelled to disclose the confidences, for there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate.

8 WIGMORE, EVIDENCE § 2323.

II

Justifiably unwilling to embrace the Independent Counsel's call for wholesale abrogation of the privilege in federal criminal cases after a client's death, the court today adopts a balancing test under which posthumous availability of the privilege turns on an ex post facto assessment of the evidence's importance, a test that neither party to this litigation advocates and that, notwithstanding protestations to the contrary, Maj. Op. at 3-4, represents a dramatic departure from the common law rule. The court cites no cases supporting its new rule, relying instead on views of commentators never accepted by any court or legislature. *See, e.g.*, 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5498 (1986 & Supp. 1997); Maj. Op. at 4-5. The court sees particular significance in a draft revision of the Restatement (Third) of the Law Governing Lawyers supporting a posthumous exception to the common law rule. Maj. Op. at 5. The Restatement, however, candidly acknowledges that "no court or legislature has adopted" such an exception. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, cmt. d (Proposed Final Draft No. 1, 1996). The court also observes that the common law rule is most often stated in cases involving the testamentary exception and that "holdings actually *manifesting* the posthumous force of the privilege are relatively rare." Maj. Op. at 3. These observations prove nothing. Such holdings appear rarely not because judicial recognition of a posthumous privilege is "tepid," *id.* at 3, but because situations where the attorney-client privilege is challenged after a client's death occur rarely. Most significantly, in all but one reported case where the attorney-client privilege was challenged after a client's death, courts have upheld the privilege, even where the result denied critical information to the trier of fact. *See, e.g., John Doe Grand Jury Investigation*, 562 N.E.2d at 72 (attorney could not be compelled

to testify about what deceased client told him prior to committing suicide, even though the testimony might have brought an end to murder investigation); *Macumber*, 544 P.2d at 1068 (trial court properly excluded testimony of two attorneys that a person other than the defendant had confessed to them of committing the murder for which defendant was tried); *see also* Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45, 65 (1992). *But see Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 693 (Pa. Super. Ct. 1976) (where testimony sought did not contain "scandalous and impertinent matter which would serve to blacken the memory" of the deceased client, and where need for testimony is "clearly established," court could compel attorney to testify).

There is a very good reason why no case law supports my colleague's new balancing test: unless clients know before consulting their lawyers exactly what information the privilege protects—knowledge denied by the court's balancing test—few will confide candidly and fully. After this decision, lawyers will have to add an important caveat to what they advise their clients about confidentiality:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

Because clients so advised will not know whether their confidences will be protected, they will be less likely to disclose sensitive or potentially inculpatory information. "If the purpose of the attorney-client privilege is to be served," said the Supreme Court in *Upjohn*, "the attorney and client must be able to predict with some degree of

certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 393. As the Court put it, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* Consistent with this reasoning, federal courts uniformly hold that where applicable, the attorney-client privilege, unlike qualified privileges, *see, e.g., In Re Sealed Case*, 116 F.3d 550 (D.C. Cir. 1997) (dealing with executive privilege and requiring specific demonstration of evidence's importance to grand jury investigation and unavailability from other sources), cannot be overridden by a showing of need. *See, e.g., Admiral Ins. Co. v. United States Dist. Ct. for the Dist. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989) (conditional protection of work product doctrine "cannot logically be extended to support an unavailability exception to the attorney-client privilege"); *In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2d Cir. 1979) (attorney-client privilege is unqualified); MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 2.01, at 2-7 to 2-8 (citing cases and noting that "once the privilege has been held applicable, information protected thereunder may not be the subject of compelled disclosure regardless of the need or good cause shown"). For the same reasons and citing *Upjohn*, the Supreme Court, in the case of the psychoanalyst privilege, rejected a balancing test which, like the one the court adopts today, turned in large part on the importance of the information sought by the prosecution: "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee*, 116 S. Ct. at 1932.

My colleagues characterize the absolute nature of the attorney-client privilege as "illusory." Maj. Op. at 8. Pointing to the testamentary exception and to the well-accepted proposition that statements relating to future il-

legality find no protection in the attorney-client privilege, they suggest that their new exception, limited to criminal proceedings after the client's death, will likewise not weaken the privilege. Both the testamentary exception and the exclusion of statements of future criminality, however, differ significantly from the balancing test the court adopts today. In those two situations, clients know up front with certainty that the statements they make are unprotected by the privilege. Beyond those two clear situations, clients and their lawyers cannot predict whether a client's statement might some day relate to a criminal investigation, much less whether a court applying my colleagues' balancing test will subsequently decide that the information "bear[s] on a significant aspect of the crimes at issue." *Id.* at 10. Because of this uncertainty, the court's balancing test produces precisely the same "murkiness that persuaded the Court in *Upjohn* and *Jaffee* to reject the limitations proposed there." *Id.* at 10.

The court believes its balancing test will not damage the attorney-client privilege because people are generally indifferent to the effect posthumous disclosures of confidences could have on their reputations. This assumption of the unimportance of posthumous reputation, however, runs counter to the rationale underlying the common law rule. *See* Frankel, *The Attorney-Client Privilege After the Death of the Client* at 61-63 & n.91. It also defies both common sense and experience. From Andrew Carnegie's libraries to Henry Ford's foundation, one need only count the schools and universities, academic chairs and scholarships, charitable foundations, research institutes, and sports arenas—even Acts of Congress—bearing the names of their founders, benefactors, or authors to understand that human beings care deeply about how posterity will view them. Evidence of concern for surviving friends and family likewise abounds: people write wills, convey property, buy life insurance, invest for their children's education, and make guardianship arrangements to protect the interests of

loved ones. Prominent public officials restrict access to their papers to protect reputations. Of course, such concerns may not influence *every* decision to confide potentially damaging information to attorneys. But because these concerns very well may affect *some* decisions, particularly by the aged, the seriously ill, the suicidal, or those with heightened interests in their posthumous reputations, I cannot accept the court's assumption that the attorney-client relationship will not suffer if the privilege is limited after a client's death. I agree with the Supreme Judicial Court of Massachusetts: "to disclose information given to [an attorney] by a client in confidence, even though such disclosure might be limited to the period after the client's death, would in many instances . . . so deter the client from 'telling all' as to seriously impair the attorney's ability to function effectively." *John Doe Grand Jury Investigation*, 562 N.E.2d at 71.

The facts of the present case vividly illustrate the value a person can place on reputation. As the Independent Counsel acknowledges, *see* Appellant's Br. at 10 n.4, his predecessor, Independent Counsel Robert Fiske, found that the Travel Office matter caused Foster distress and may have contributed to his decision to take his own life. Appellee's Br. at 22 (citing Report of the Independent Counsel In Re Vincent W. Foster, Jr. 10-14 (June 30, 1994)). Revealing the value he placed on personal reputation, Foster told law students in a commencement address shortly before his death: "There is no victory, no advantage, no fee, no favor which is worth even a blemish on your reputation for intellect and integrity. . . . The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy." *Id.* Foster committed suicide nine days after confiding in his attorney. Although I concede that no single case can prove the utility of maintaining the privilege beyond a client's death, this case seems a particularly inappropriate one in which to abrogate the common law's posthumous protection of the attorney-client privilege.

The court suggests that because it limits its balancing test to criminal cases and because criminal liability ceases with death, its test will not chill client communications with their lawyers. Maj. Op. at 6-7. But clients often reveal to their lawyers much more than information about their own criminal liability: they may disclose information that could expose friends, family, or business associates to criminal culpability—which does not terminate with the client's death—as well as information that could damage their own reputations. The possible release of such information could chill the attorney-client relationship just as seriously as the release of information about the client's own criminal liability.

The court claims that unless the privilege terminates at the client's death, information will be lost that could have been sought from the client while alive. *Id.* at 7. The common law rule, however, long ago determined that the benefits the legal system gains through recognizing the privilege posthumously outweigh whatever damage might flow from denying information to the factfinder in a particular case. Further balancing on a case by case basis will undermine the privilege. Moreover, if limiting the scope of the privilege deters "full and frank" attorney-client communication, as the common law assumes, who can say that in the absence of the privilege information later sought in criminal proceedings would have been shared with counsel in the first place? As the Supreme Court explained in the psychotherapist privilege context, "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Jaffee*, 116 S. Ct. at 1929; *see also* Salzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 610 (1980) ("The privilege creates a zone of privacy in which an attorney and client can create information that did not exist before and might not exist otherwise.") Clients will be particularly reluctant to share critical information with their lawyers in cases where both the client's death and the possibility of criminal investigation are foreseeable. Perhaps this is such a case, for at oral argument, the deceased's lawyer told us:

> I am not sure of a lot of things in life. I am not certain of why Mr. Foster took his own life, even though I think it's because of the taxing of his reputation and his fear about the trial of this investigation. . . . But I am totally certain, I am totally certain of one thing . . . If I had not assured Mr. Foster that our conversation was a privileged conversation, we would not have had that conversation *and there would be no notes that are the subject of the situation today*. (Emphasis added.)

Nor can I see any way to limit the Court's "information loss" argument to cases in which the client has died. Witnesses unable to remember facts, incompetent to testify, or beyond the court's process likewise deny relevant information to the factfinder. Yet neither the Independent Counsel nor this court suggests that we abrogate the attorney-client privilege to fill in these evidentiary gaps. The unavailability of a witness likewise does no greater harm to the factfinding process than an available witness who testifies inaccurately. Again, no one would suggest that we call upon attorneys to corroborate or correct their clients' every statement. The reason is simple: accepting that some information may be lost to a factfinder, we insulate the attorney-client relationship from the prospect of these intrusions in order to promote the " 'confidence and trust,' " *Jaffee*, 116 S. Ct. at 1928 (quoting *Trammel*, 445 U.S. at 51), necessary for the relationship to work and to afford society its benefits. *See Admiral Insurance Co.*, 881 F.2d at 1494 ("Any inequity in terms of access to information is the price the system pays to maintain the integrity of the privilege."). Neither the court nor the Independent Counsel has offered any convincing reason why a client's death should be treated differently than these other circumstances.

At the end of its discussion of the attorney-client privilege, the court suggests that district courts could protect

clients' interests by ordering that their lawyers' testimony be kept confidential. Maj. Op. at 10. But evidence essential to the prosecution's case at trial cannot ultimately remain confidential. In any event, the privilege's fundamental purpose is to encourage clients to share information with their lawyers, not to maintain the information's confidentiality. Qualified promises of confidentiality—"Don't worry, if I am compelled to reveal what you tell me, the court will make sure that no one hears it other than the U.S. Attorney and the federal grand jury"—are unlikely to encourage worried clients to make candid and full disclosures to their attorneys.

III

The court's decision too readily dismisses the continuing vitality of the common law rule in the states. "It is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" *Jaffee*, 116 S. Ct. at 1930 (quoting *Funk v. United States*, 290 U.S. 371, 376-81 (1933)). The fact that the common law's posthumous recognition of the privilege outside testamentary disputes appears to have been embraced by every state that has codified the privilege—and remains the law in those that have not—counsels against casting it aside simply because the Independent Counsel and a few commentators question its usefulness. That the common law rule was likewise adopted by the Supreme Court's Advisory Committee, as well as by the committees who drafted the Model Code of Evidence and the Uniform Rules of Evidence, reinforces the conclusion that "'reason' and 'experience'" support posthumous protection of the attorney-client privilege. *Id.*; *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 & n.6 (8th Cir. 1981) (Supreme Court Proposed Federal Rule of Evidence 503(c) useful "as a source for defining the federal common law of attorney-client privilege").

Because the court's balancing test strikes a fundamental blow to the attorney-client privilege and jeopardizes its benefits to the legal system and society, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed November 21, 1997

No. 97-3006

IN RE: SEALED CASE

Consolidated with
No. 97-3007

Appeals from the United States District Court
for the District of Columbia
(No. 95ms00446; No. 95ms00447)

BEFORE: EDWARDS, *Chief Judge*; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

On Appellees' Suggestion
for Rehearing *In Banc*

ORDER

Appellees' Suggestion for Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

A statement of *Circuit Judge* TATEL dissenting from the denial of rehearing *in banc*, in which *Circuit Judge* GINSBURG joins with respect to the issue of attorney-client privilege, is attached.

Circuit Judges SENTELLE and GARLAND did not participate in this matter.

TATEL, *Circuit Judge*, with whom GINSBURG, *Circuit Judge*, joins with respect to the issue of attorney-client privilege, dissenting from the denial of rehearing *in banc*: Dramatically departing from the common law rule that protects the attorney-client privilege after a client's death, and threatening the vitality of that privilege, this case raises issues of exceptional importance worthy of *in banc* consideration. *See* FED. R. APP. P. 35(a)(2). The case especially warrants *in banc* review because the consequences of the court's new balancing test will extend far beyond federal criminal cases in the District of Columbia. Clients involved in civil or criminal proceedings anywhere in the country have no way of knowing whether information they share with their lawyers might someday become relevant to a federal criminal investigation in Washington, D.C. As the Supreme Court noted regarding the psychotherapist privilege, "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930 (1996).

As I pointed out in my dissent, the common law rule has been incorporated in the Uniform Rules of Evidence and the Model Code of Evidence, adopted by the Supreme Court's Advisory Committee, and codified by at least twenty state legislatures. *In re Sealed Case*, 124 F.3d 230, 238 (D.C. Cir. 1997) (Tatel, J., dissenting). The Independent Counsel cites two cases that have abrogated the privilege after a client's death, but neither is relevant here. In both *State v. Gause*, 489 P.2d 830 (Ariz. 1971), and *State v. Kump*, 301 P.2d 808 (Wyo. 1956), courts held that an accused husband could not invoke the privilege on behalf of his dead wife to bar his wife's lawyer from testifying, a situation quite different from this case where the attorney himself has invoked the privilege on behalf of his deceased client. As the court in *Gause* said, "the privilege is that of the client and must be claimed by the client or someone authorized by law to do so on the client's behalf." *Gause*, 489 P.2d at 834. Until this court's decision, only one reported case—a never-cited opinion of a mid-level Pennsylvania appellate court—actually supported posthumous abrogation of the privilege when asserted by the lawyer in a nontestamentary dispute. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

According to the Independent Counsel, empirical support is "nonexistent" for the proposition that abrogating the attorney-client privilege after the client's death will chill client communication. Opposition of the United States to Appellees' Petition for Rehearing With Suggestion for Rehearing In Banc at 12. But because the Independent Counsel himself urges overturning the common law rule, and because that rule rests on the proposition that preserving the attorney-client privilege after the client's death is necessary to promote client disclosure, the Independent Counsel bears the responsibility of producing evidence to the contrary. In place of such evidence, he offers only his opinion that "any hypothesized chilling effect would be minimal," *id.*, citing only this court's opinion that it "ex-

pect[s]" its balancing test's "chilling effect to fall somewhere between modest and nil," *Sealed Case*, 124 F.3d at 233. Without convincing evidence that abrogating the privilege will do no harm to client communications, this court should not abandon centuries of common law.

Invoking a parade of horribles not before us, the Independent Counsel claims that injustice will result if courts cannot abrogate the attorney-client privilege after the client's death. While in some cases the privilege will deny information to the trier of fact, it does so in order to promote a broader and more important value—encouraging the free flow of information from client to lawyer. The common law long ago determined that the benefits gained by recognizing the privilege posthumously outweigh whatever damage might flow from denying information to the trier of fact in any particular case. *Id.* at 241 (Tatel, J., dissenting).

Petitioner also seeks rehearing *in banc* with respect to the court's work product ruling. *Id.* at 235-37. Because drawing a precise line between fact and opinion work product is a difficult and sensitive question with serious implications for the attorney-client relationship, and because I think the court has drawn the line in the wrong place, this issue also warrants *in banc* review.

The court's conclusion that because the interview was "preliminary" and "initiated" by the client, the lawyer may not have "sharply focused or weeded" the words of the client, *id.* at 236, reflects a view of the lawyer's role very different from my own experience. No lawyer approaches a client's problems with a "blank slate." Appellee's Petition for Rehearing With Suggestion for Rehearing En Banc at 14. Even at a first meeting, regardless of who initiates it, lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients. Of course lawyers may want to encourage wide-ranging discussions at first meetings, but they do so in order to draw out and

record information they think might be important. Unless they take verbatim notes, the questions they ask and those facts they write down reflect their own views about what is important to their client's case. Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the "opinions, judgments, and thought processes of counsel." *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

The notes in this case demonstrate quite clearly that the lawyer actively exercised his judgment when interviewing his client. In two hours, he created only three pages of notes. Far from taking verbatim notes, the lawyer obviously wrote down what he thought was significant, omitting everything else. The notes bear the markings of a lawyer focusing the words of his client; he underlined certain words, placing both checkmarks and question marks next to certain sections. The notes clearly represent the opinions, judgments, and thought processes of counsel.

After this decision, no lawyer will risk having his notes end up before a grand jury because of a judicial finding that he had not "sharply focused or weeded" the words of the client; lawyers will simply stop taking notes at early, critical meetings with clients. Not only will this damage the ability of lawyers to represent their clients but in the end there will be no notes for grand juries to see. Similar consequences, of course, may flow from the court's new attorney-client privilege balancing test; advised that their disclosures might be unprotected after death, clients may simply not talk candidly. As the Supreme Court noted in the psychotherapist privilege context, "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Jaffee*, 116 S. Ct. at 1929. This court's two new holdings—one chilling client disclosure, the other chilling lawyer note-

taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process.

APPENDIX C

[Filed Jan. 7, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-446 JGP
(UNDER SEAL)

IN RE GRAND JURY NO. 95-1
Subpoena *duces tecum* to
SWIDLER & BERLIN

ORDER

The Memorandum Order filed in this matter on December 16, 1996 is corrected to reflect the following change in the caption: "IN RE GRAND JURY NO. 95-2" in place of "IN RE GRAND JURY NO. 95-1."

SO ORDERED

[Jan. 4, 1997]

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

[Filed Dec. 16, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-446 JGP
(UNDER SEAL)

IN RE GRAND JURY No. 95-1
Subpoena *duces tecum* to
SWIDLER & BERLIN

MEMORANDUM ORDER

This matter comes before the Court of the Motion To Quash Or Modify Grand Jury Subpoena. Actually, there are two subpoenas, one issued to James Hamilton, an attorney, and the other to Hamilton's law firm, Swidler & Berlin.[1] This litigation arises out of the so-called "Whitewater" investigation being conducted by Independent Counsel Kenneth Starr. As a part of that investigation, the Independent Counsel is also investigating the circumstances surrounding the death of Vincent Foster, who served as Deputy White House Counsel. Also pending before the Court are the Motions To Intervene, filed by Lisa Foster, Mr. Foster's widow, and Sheila Anthony, Mr. Foster's sister. The Court will grant the motions to intervene.

Very briefly, the underlying facts are as follows: On the evening of July 20, 1993, Vincent Foster was found dead of a gunshot wound in Fort Marcy Park, Virginia. On the following day, the Foster family retained Hamilton and Swidler & Berlin to represent them.[2] Hamilton Affidavit,

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[1] A separate matter and case number have been assigned for each case.

[2] The family members represented include Foster's wife, Lisa Foster, his children, Vincent, Laura and John Brugh Foster, his mother, Alice Mae Foster, his sisters, Sharon Bowman and Sheila Anthony, and Beryl Anthony, Sheila Anthony's husband. Hamilton Affidavit, ¶ 3.

¶ 3. The movants assert that "[a]fter extensive investigations, the United States Park Police, the Department of Justice, Independent Counsel Robert Fiske,[3] and Senate Banking Committee, among others, concluded that he [Vincent Foster] had committed suicide in Fort Marcy Park." Hamilton Affidavit, ¶ 1.

Hamilton states that he was retained to represent the family because of his experience in litigation and civil, criminal and Congressional investigations, "particularly those involving highly-publicized matters." He asserts that he was not retained because of any expertise in probate, estate or business law. In considering the pending motions, the Court accepts those representations. He goes on to state that "from the outset" he and the law firm anticipated that litigation "could well occur in various forms." See Hamilton Affidavit, ¶¶ 18-32. Hamilton states that in the course of his representation of the family, he has spoken to "numerous persons, conducted substantial legal research, engaged in litigaton, and communicated our views in writing to various government bodies." Hamilton Affidavit, ¶ 17. He goes on to state that "[t]hroughout our representation we have on many occasions made notes of our conversations with third parties, our conversations with our clients, our internal firm conferences and analysis and our research, observations and analysis. These notes embody our mental impressions, conclusions, opinions, theories, thought processes, selection of topics of importance, and strategies. In our view, they are not only work product, but in many instances they are core work product." Hamilton Affidavit, ¶ 17. The movants contend that counsel anticipated that "litigation could result from overreaching investigations," that there might be Freedom

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[3] Mr. Fiske was succeeded as Independent Counsel by Kenneth Starr.

of Information Act (FOIA) litigation "regarding Mr. Foster's now-famous note," that family members and their lawyers could become witnesses in litigation and in other proceedings, that litigation could result against famiiy members "if they misspoke in giving evidence," and that counsel anticipated "litigation by the family to protect the family's privacy interests, redress defamation, or remedy misuses of Mr. Foster's name and image."

The movants argue that the subpoenas are unreasonable and oppressive and should be quashed or modified because they seek materials protected by the work product doctrine and the attorney-client and common interest privileges.

After the motions to quash were filed, the Court required the movants to furnish the contested documents to the Court for its *in camera* review. The Court also required the movants to file a privilege log identifying the date, author, addressee and description of the documents and the privilege claimed for each document. The movants filed a privilege log and then an amended privilege log. The movants claim a privilege for all documents under the work product doctrine. With respect to a few documents, they claim, in addition to work product, attorney-client privilege, common interest privilege, or both.

As may be expected, the Independent Counsel has a much different view of the subpoenaed documents. He notes that the subpoenas were issued as part of Independent Counsel's grand jury investigation into possible criminal violations involving the death of Mr. Foster and to determine whether individuals made false statements or obstructed justice in connection with the investigation into the firing of employees of the White House Travel Office in May 1993. The Independent Counsel disputes the movants' claim that the work product doctrine is applicable under the acts in this matter based upon his contention that the grand jury "ordinarily" has a right to obtain "all" relevant non-privileged evidence and further because the

documents were not prepared in anticipation of litigation. Independent Counsel goes on to argue that even if a document was prepared in anticipation of litigation, that alone will not exempt it from production to the grand jury. He argues that a balancing test must be applied to determine whether disclosure is nevertheless warranted. Independent Counsel also argues against invocation of attorney-client privilege and the comman interest rule. Finally, the Independent Counsel draws a distinction between documents relating to conversations *before* the death of Vincent Foster and those documents created *after* his death.

The Court will now turn to a discussion of those privileges as they relate to the subject documents.

I

The most important issue raised in this document request is whether the documents sought by the Independent Counsel are protected from production under the work product doctrine. Any discussion of that doctrine or privilege must begin with the decision in *Hickman v. Taylor*, 329 U.S. 495, 76 S.Ct. 385 (1947). There, the Supreme Court observed:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion of opposing parties and their counsel. Proper preparation of a clients's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's cases, discovery may properly be had.

329 U.S. at 510-11, 67 S.Ct. A 393-94 (emphasis this Court's). Thirty-four years later, the Supreme Court reaffirmed the "strong public policy" underlying the work product doctrine in *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160 (1975). *Upjohn Company v. United States*, 449 U.S. 383, 398, 101 S.Ct. 677, 686 (1981).

The Court of Appeals for this Circuit has made clear that the work product doctrine applies to matters pending before a federal grand jury. *In re Sealed Case*, 308 U.S. App.D.C. 69, 29 F.3d 715 (1994). Moreover, that case is instructive because the court noted:

> In rejecting the appellant's assertion of the privilege, the district court indicated that the privilege was inapplicable because no grand jury investigation had commenced at the time. We disagree. The work product privilege protects any material obtained or prepared by a lawyer *"in the course of his legal duties, provided that the work was done with an eye toward litigation."* Even though the grand jury investigation had not begun when the Lawyer met with the appellant and prepared his file, he may well have had an eye toward litigation.

308 U.S.App.D.C. at 72, 29 F.3d at 718 (citations omitted, emphasis this Court's). The court went on to state: "In determining whether the materials in the Lawyer's files arre protected by the work product privilege, 'the testing question is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* (citation omitted).

Although the movants resisted the preparation of a privilege log, the Court required them to submit a privilege log to the Court and Independent Counsel. After reviewing the privilege log, Independent Counsel advised the Court and the movants that the "the log has enabled us to cull out documents that we do not need or that are, in our view privileged. We thus are able to focus our argument to this Court on particular classes of documents."

II

Before addressing the documents now identified by the Independent Counsel based on the privilege log, the Court finds that all of the documents were prepared in anticipation of or with an eye toward litigation. This finding is based upon the affidavit of Mr. Hamilton and the Court's *in camera* review of the documents. The Court also observes that general experience in matters of this nature cannot help but lead all but the most unsophisticated person to conclude that there would be an investigation into the facts and circumstances of Mr. Foster's death and that

an eager media would seek to obtain materials which the family may wish to hold private. Moreover, political reality makes very clear that the matter would be subject to grand jury investigation, Congressional hearings and intense public scrutiny. It can hardly be doubted that, as Mr. Hamilton has stated, the material was collected with an eye toward litigation in one form or another.

After reviewing the privilege log, the Independent Counsel identified specific documents he wanted produced. The Court concludes that, with respect to those documents not so identified, the Independent Counsel has withdrawn his request for their production. As has the Independent Counsel, the Court will identify the documents by their "Bates" number or numbers. The Court will now discuss the documents in the order identified by Independent Counsel in his opposition to the motion.

Documents 2774-2883.

Independent Counsel has requested Documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains handwritten notes and notations in the form of comments and under linings made by James Hamilton. Movants assert a work product privilege and describe the document as: "Handwritten notes on 7/2/93 White House Travel Office Management Review Report made in anticipation of meeting with Vincent Foster concerning possible representation." The Court finds that this document, as described in the privilege log, should be exempt from disclosure to the grand jury. It contains notes and underlining which represent the mental impressions of the attorney. Although this document was prepared before Mr. Foster's death, the Court concludes that Foster was consulting Hamilton as an attorney and possibly to represent him. Finally in applying the balancing test for this document, the Court finds nothing in the document which would suggest that the grand jury's need for the document outweighs the privilege. This document need not be produced.

* * * *

[Two paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

With respect to Hamilton's meeting with Foster on July 11, 1993, the Independent Counsel seeks documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains some handwritten notations in the form of comments and underlining made by James Hamilton. The Court finds that the movants have properly asserted work product with respect to this group of documents. Certainly there was a concern about the implications of certain actions and decisions of the White House Counsel and Mr. Hamilton reviewed the documents with this in mind. The notations and underlined portions of the document is evidence of Hamilton mental impressions.

Documents 490-492, 528-30, 569-71.

These documents are described in the privilege log as "[h]andwritten notes regarding conversation with Vincent Foster about possible representation." Movants claim work product and the attorney-client privilege. The three documents appear to be copies of the same document. Hamiltion is the author of the notes. The Court concludes that the notes are privileged. They were made at a time when Hamilton met with Foster to discuss possible representation of Foster. It appears clear that Foster spoke with Hamilton as an attorney and a review of the notes supports that finding. Moreover, one of the first notations on the document is the word: "Privileged," so it is obvious that the parties, Hamilton and Foster, viewed this as a privileged conversation and the notes of that conversation as privileged, both under the attorney-client privilege and as work product. These notes and others that are discussed are a demonstration of why "it is essential

that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. at 510, 67 S.Ct. at 393. The written notes reflect the mental impressions of the lawyer and there is nothing in the record which suggests that any need by the grand jury trumps the privileges. The documents need not be produced.

* * * *

[12 paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

In sum, the Court concludes that the documents are privileged for the reasons stated above and further, that in applying a balancing test, the need of the grand jury does not outweigh the privileges asserted.

The Court has reviewed the remaining documents, including those no longer requested by the Independent Counsel, and concludes that they are privileged for the reasons stated in the privilege log.

It is hereby

ORDERED that the motions to intervene filed by Lisa Foster and Sheila Anthony are granted, and it is further

ORDERED that the motion to quash or modify grand jury subpoena is denied in part and granted in part; the motion to quash the subpoena is denied, and the motion to modify is granted in that, consistent with this Memorandum Order, Swidler & Berlin is not required to produce the documents described in the privilege log.

[Dec. 16, 1996]

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

APPENDIX D

[Filed Jan. 7, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-447 JGP
(UNDER SEAL)

IN RE GRAND JURY NO. 95-2
Subpoena *duces tecum* to
JAMES HAMILTON

ORDER

The Memorandum Order filed in this matter on December 16, 1996 is corrected to reflect the following change in the caption: "IN RE GRAND JURY NO. 95-2" in place of "IN RE GRAND JURY NO. 95-1."

SO ORDERED

[Jan. 4, 1997]

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

[Filed Dec. 16, 1996]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 95-447 JGP
(UNDER SEAL)

IN RE GRAND JURY No. 95-1
Subpoena *duces tecum* to
JAMES HAMILTON

MEMORANDUM ORDER

This matter comes before the Court on the Motion To Quash Or Modify Grand Jury Subpoena. Actually, there are two subpoenas, one issued to James Hamilton, an attorney, and the other to Hamilton's law firm, Swidler & Berlin.[1] This litigation arises out of the so-called "Whitewater" investigation being conducted by Independent Counsel Kenneth Starr. As a part of that investigation, the Independent Counsel is also investigating the circumstances surrounding the death of Vincent Foster, who served as Deputy White House Counsel. Also pending before the Court are the Motions To Intervene, filed by Lisa Foster, Mr. Foster's widow, and Sheila Anthony, Mr. Foster's sister. The Court will grant the motions to intervene.

Very briefly, the underlying facts are as follows: On the evening of July 20, 1993, Vincent Foster was found dead of a gunshot wound in Fort Marcy Park, Virginia. On the following day, the Foster family retained Hamilton

[1] A separate matter and case number have been assigned for each case.

and Swidler & Berlin to represent them.[2] Hamilton Affidavit, ¶ 3. The movants assert that "[a]fter extensive investigations, the United States Park Police, the Department of Justice, Independent Counsel Robert Fisks [3], and the Senate Banking Committee, among others, concluded that he [Vincent Foster] had committed suicide in Fort Marcy Park." Hamilton Affidavit, ¶ 1.

Hamilton states that he was retained to represent the family because of his experience in litigation and civil, criminal and Congressional investigations, "particularly those involving highly-publicized matters." He asserts that he was not retained because of any expertise in probate, estate or business law. In considering the pending motions, the Court accepts those representations. He goes on to state that "from the outset" he and the law firm anticipated that litigation "could well occur in various forms." *See* Hamilton Affidavit, ¶¶ 18-32. Hamilton states that in the course of his representation of the family, he has spoken to "numerous persons, conducted substantial legal research, engaged in litigation, and communicated our views in writing to various government bodies." Hamilton Affidavit, ¶ 17. He goes on to state that "[t]houghout our representation we have on many occasions made notes of our conservations with third parties, our conservations with our clients, our internal firm conferences and analysis and our research, observations and analysis. These notes embody our mental impressions, conclusions, opinions, theories, thought processes, selection of topics of importance, and strategies. In our view,

[2] The family members represented include Foster's wife, Lisa Foster, his children, Vincent, Laura and John Brugh Foster, his mother, Alice Mae Foster, his sisters, Sharon Bowman and Sheila Anthony, and Beryl Anthony, Sheila Anthony's husband. Hamilton Affidavit, ¶ 3.

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they are not only work product, but in many instances they are core work product." Hamilton Affidavit, ¶ 17. The movants contend that counsel anticipated that "litigation could result from overreaching investigations," that there might be Freedom of Information Act (FOIA) litigation "regarding Mr. Foster's now-famous note," that family members and their lawyers could become witnesses in litigation and in other proceedings, that litigation could result against family members "if they misspoke in giving evidence," and that counsel anticipated "litigation by the family to protect the family's privacy interests, redress defamation, or remedy misuses of Mr. Foster's name and image."

The movants argue that the subpoenas are unreasonable and oppressive and should be quashed or modified because they seek materials protected by the work product doctrine and the attorney-client and common interest privileges.

After the motions to quash were filed, the Court required the movants to furnish the contested documents to the Court for its *in camera* review. The Court also required the movants to file a privilege log identifying the date, author, addressee and description of the documents and the privilege claimed for each document. The movants filed a privelege log and then an amended privilege log. The movants claim a privilege for all documents under the work product doctrine. With respect to a few documents, they claim, in addition to work product, attorney-client privilege, common interest privilege, or both.

As may be expected, the Independent Counsel has a much different view of the subpoenaed documents. He notes that the subpoenas were issued as part of Independent Counsel's grand jury investigation into possible criminal violations involving the death of Mr. Foster and to determine whether individuals made false statements or obstructed justice in connection with the investigation into the firing of employees of the White House Travel Office

in May 1993. The Independent Counsel disputes the movants' claim that the work products doctrine is applicable under the facts in this matter based upon his contention that the grand jury "ordinarily" has a right to obtain "all" relevant non-privileged evidence and further because the documents were not prepared in anticipation of litigation. Independent Council goes on to argue that even if a document was prepared in anticipation of litigation, that alone will not exempt it from production to the grand jury. He argues that a balancing test must be applied to determine whether disclosure is nevertheless warranted. Independent Counsel also argues against invocation of attorney-client privilege and the common interest rule. Finally, the Independent Counsel draws a distinction between documents relating to conversations *before* the death of Vincent Foster and those documents created *after* his death.

The Court will now turn to a discussion of those privileges as they relate to the subject documents.

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from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. *This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways*—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. And the interests of the clients and the cause of justice would be poorly served.

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before a federal grand jury. *In re Sealed Case*, 308 U.S. App.D.C. 69, 29 F.3d 715 (1994). Moreover, that case is instructive because the court noted:

> In rejecting the appellant's assertion of the privilege, the district court indicated that the privilege was inapplicable because no grand jury investigation had commenced at the time. We disagree. The work product privilege protects any material obtained or prepared by a lawyer *"in the course of his legal duties, provided that the work was done with an eye toward litigation."* Even though the grand jury investigation had not begun when the Lawyer met with the appellant and prepared his file, he may well have had an eye toward litigation.

308 U.S.App.D.C. at 72, 29 F.3d at 718 (citations omitted, emphasis this Court's). The court went on to state: "In determining whether the materials in the Lawyer's files are protected by the work product privilege, 'the testing question is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id* (citation omitted).

Although the movants resisted the preparation of a privilege log, the Court required them to submit a privilege log to the Court and Independent Counsel. After reviewing the privilege log, Independent Counsel advised the Court and the movants that the "the log has enabled us to cull out documents that we do not need or that are, in our view privileged. We thus are able to focus our argument to this Court on particular classes of documents."

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tion of or with an eye toward litigation. This finding is based upon the affidavit of Mr. Hamilton and the Court's *in camera* review of the documents. The Court also observes that general experience in matters of this nature cannot help but lead all but the most unsophisticated person to conclude that there would be an investigation into the facts and circumstances of Mr. Foster's death and that an eager media would seek to obtain materials which the family may wish to hold private. Moreover, political reality makes very clear that the matter would be subject to grand jury investigation, Congressional hearings and intense public scrutiny. It can hardly be doubted that, as Mr. Hamilton has stated, the material was collected with an eye toward litigation in one form or another.

After reviewing the privilege log, the Independent Counsel identified specific documents he wanted produced. The Court concludes that, with respect to those documents not so identified, the Independent Counsel has withdrawn his request for their production. As has the Independent Counsel, the Court will identify the documents by their "Bates" number or numbers. The Court will now discuss the documents in the order identified by Independent Counsel in his opposition to the motion.

Documents 2774-2883.

Independent Counsel has requested Documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains handwritten notes and notations in the form of comments and under linings made by James Hamilton. Movants assert a work product privilege and describe the document as "Handwritten notes on 7/2/93 White House travel Office Management Review Report made in anticipation of meeting with Vincent Foster concerning possible representation." The Court finds that this document, as described in the privilege log, should be exempt from disclosure to the grand jury. It contains notes and underlining which represent the mental impressions of the attorney. Although this document was prepared before Mr. Foster's death, the Court concludes that Foster was consulting Hamilton as an attorney and possibly to represent him. Finally in applying the balancing test for this document, the Court finds nothing in the document which would suggest that the grand jury's need for the document outweighs the privilege. This document need not be produced.

* * * *

[Two paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

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With respect to Hamilton's meeting with Foster on July 11, 1993, the Independent Counsel seeks documents 2774-2882. Document 2774-2802 is the White House Travel Office Management Review which contains some handwritten notations in the form of comments and underlining made by James Hamilton. The Court finds that the movants have properly asserted work product with respect to this group of documents. Certainly there was a concern about the implications of certain actions and decisions of the White House Counsel and Mr. Hamilton reviewed the documents with this in mind. The notations and underlined portions of the document is evidence of Hamilton mental impressions.

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These documents are described in the privilege log as "[h]andwritten notes regarding conversation with Vincent Foster about possible representation." Movants claim work product and the attorney-client privilege. The three documents appear to be copies of the same document. Hamilton is the author of the notes. The Court concludes that the notes are privileged. They were made at a time when Hamilton met with Foster to discuss possible representation of Foster. It appears clear that Foster spoke

with Hamilton as an attorney and a review of the notes supports that finding. Moreover, one of the first notations on the document is the word: "Privileged," so it is obvious that the parties, Hamilton and Foster, viewed this as a privileged conversation and the notes of that conversation as privileged, both under the attorney-client privilege and as work product. These notes and others that are discussed are a demonstration of why "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. at 510, 67 S.Ct. at 393. The written notes reflect the mental impressions of the lawyer and there is nothing in the record which suggests that any need by the grand jury trumps the privileges. The documents need not be produced.

* * * *

[12 paragraphs of this opinion at this point are still under seal. They have no impact on this case. We have lodged with the Clerk 10 unredacted copies of this opinion.]

* * * *

In sum, the Court concludes that the documents are privileged for the reasons stated above and further, that in applying a balancing test, the need of the grand jury does not outweigh the privileges asserted.

The Court has reviewed the remaining documents, including those no longer requested by the Independent Counsel, and concludes that they are privileged for the reasons stated in the privilege log.

It is hereby

ORDERED that the motions to intervene filed by Lisa Foster and Sheila Anthony are granted, and it is further

ORDERED that the motion to quash or modify grand jury subpoena is denied in part and granted in part; the motion to quash the subpoena is denied, and the motion to modify is granted in that, consistent with this Memo-

randum Order, Swidler & Berlin is not required to produce the documents described in the privilege log.

/s/ John Garrett Penn
JOHN GARRETT PENN
Chief Judge

[Dec. 16, 1996]

APPENDIX E

RULES OF CIVIL PROCEDURE

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * *

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the

person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

* * * *

APPENDIX F

RULES OF EVIDENCE

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.)

No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR *
Independent Counsel

STEPHEN BATES
Associate Independent Counsel
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* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the attorney-client privilege under Fed. R. Evid. 501 authorizes disclosure of information "whose relative importance is substantial" in federal criminal proceedings after the client's death.

2. Whether the work product doctrine authorizes disclosure of an attorney's notes of an interview with a witness who is deceased and therefore unavailable.

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States, represented in this criminal investigation by the Independent Counsel in re: Madison Guaranty Savings & Loan Association, *see* 28 U.S.C. § 594(a); James Hamilton; and the law firm Swidler & Berlin.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals and a redacted version of the dissent are reported at 124 F.3d 230 and printed in full in Petitioners' Appendix (Pet. App. 1a-26a). The court's order on petition for rehearing is reported at 129 F.3d 637 (Pet. App. 27a-32a). The district court's two substantively identical opinions (one for each of the two subpoenas at issue) are unreported (Pet. App. 34a-42a and 44a-53a).

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1997. The court denied a petition for rehearing on November 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. On August 5, 1994, pursuant to the application of Attorney General Reno under 28 U.S.C. § 592(c), the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels (Special Division), appointed Kenneth W. Starr as Independent Counsel to represent the United States in investigating particular matters regarding President and Mrs. Clinton, Whitewater Development Corp., and Madison Guaranty Savings & Loan. *In re Madison Guaranty Savings & Loan Association* (D.C. Cir. Spec. Div. Aug. 5, 1994). In March and April 1996, acting under 28 U.S.C. §§ 593(c)(1) and 594(e), the Attorney General and the Special Division authorized the Office of the Independent Counsel to investigate whether particular individuals had made false statements or committed other federal crimes during various government investigations of the firings of White House Travel Office employees.

2. On May 19, 1993, the White House fired seven employees of the White House Travel Office. In response to criticism of the firings, the White House conducted an internal management review, issued a report, and reprimanded four White House officers and employees. On July 2, 1993, the Supplemental Appropriations Act of 1993, Pub. L. 103-50, was enacted, which required the General Accounting Office to review the firings.

3. On Sunday, July 11, 1993, James Hamilton, an attorney with the Washington, D.C., law firm of Swidler & Berlin, met with Deputy White House Counsel Vincent W. Foster, Jr. Mr. Foster, a former partner of Hillary Rodham Clinton's at the Rose Law Firm in Little Rock, Arkansas, had been involved in the process leading up to the Travel Office firings, although he had not been reprimanded. The July 11 conversation related to Mr. Hamilton's possible representation of Mr. Foster with respect to congressional or other investigations of the Travel Office matter. At the meeting, Mr. Hamilton took three pages of notes, which are at issue in this case. Pet. App. 31a.

On July 20, 1993, nine days after meeting with Mr. Hamilton, Mr. Foster was found dead in Fort Marcy Park in suburban Virginia. A series of official investigations ensued, all of which have concluded that Mr. Foster had killed himself by gunshot in Fort Marcy Park.

4. There is no dispute that Mr. Foster would have been an important witness in this Office's investigation of whether particular individuals made false statements or committed other federal crimes during investigations of the Travel Office firings. Because Mr. Foster is deceased, this Office has attempted, consistent with traditional and standard law enforcement practice, to obtain evidence of Mr. Foster's knowledge of the matter through any oral statements or writings he may have made. The notes taken by Mr. Hamilton during his meeting with Mr. Foster on July 11, 1993, regarding the Travel Office matter are highly relevant to this Office's investigttion.

5. On December 4, 1995, at a time when this Office was investigating Mr. Foster's death, the grand jury

subpoenaed Mr. Hamilton's notes and other documents. Petitioners (Mr. Hamilton and his law firm, Swidler & Berlin) moved to quash or modify the subpoena. On order of the district court, Mr. Hamilton produced a privilege log on July 9, 1996. On July 16, 1996, this Office identified and sought various documents listed on that log, including the notes of the 1993 conversation with Mr. Foster. In resisting the subpoena, Mr. Hamilton argued, first, that the notes were protected by the attorney-client privilege, which he contended applies even after the client's death; and, second, that they were protected by the work product doctrine.

On December 16, 1996, the district court granted Mr. Hamilton's motion in relevant part without specifically addressing whether attorney-client privilege survives the death of the client. The court found the notes protected by the attorney-client privilege and work product doctrine.

6. This Office appealed, and the court of appeals reversed. The court noted that in the vast majority of cases addressing the issue—particularly those concerning testator's intent in a will dispute—courts have held the privilege inapplicable. Pet. App. 3a. The court also emphasized that most commentators have "supported some measure of post-death curtailment" of the privilege. Pet. App. 4a. The court pointed out that Wright & Graham have emphatically rejected the suggestion that the privilege should continue to apply after death. So, too, McCormick has argued that the privilege should not apply after death. The court also cited Mueller & Kirkpatrick, who likewise concluded that the privilege should not apply after death. Pet. App. 4a-5a. The court cited Learned Hand's argument that privilege

should not apply after death. Finally, the court pointed out that the American Law Institute, in the latest draft of the Restatement (Third) of the Law Governing Lawyers, had rejected a perpetual privilege. The court noted that the ALI had suggested "a general balancing test" under which "a tribunal be empowered to withhold the privilege of a person then deceased." Pet. App. 5a.

The court concluded: "The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information; indeed, his availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to truth." Pet. App. 7a. On the other side of the balance, the court found that "the risk of post-death relevation will typically trouble the client less" and that a post-death restriction of the privilege to the realm of criminal litigation will likely cause a chilling effect "fall[ing] somewhere between modest and nil." Pet. App. 6a-7a. The court also noted that the individual "may even view history's claims to truth as more deserving." Pet. App. 7a. Because criminal liability ceases at death, the court concluded that modifying the privilege solely in the realm of criminal litigation, and leaving it unaffected in civil litigation, would exert little if any chilling effect on attorney-client communications. *Id.* Following the approach advocated by the Restatement, the court thus defined a narrow, sharply bounded exception, limited (i) to *criminal* proceedings and (ii) to statements of particular importance: "the statements must bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence." Pet. App. 10a. The court remanded the case to the district court for application of this test to the notes at issue here.

Turning to the issue of work product, the court distinguished factual information contained in an attorney's notes of an interview with an unavailable witness from the attorney's own evaluations. The court stated that "[o]ur brief review of the documents reveals portions containing factual material" and therefore rejected the district court's conclusion. Pet. App. 14a.

Judge Tatel dissented solely on the question of attorney-client privilege, and "therefore [did] not consider whether the notes are attorney work product." Pet. App. 15a. The court of appeals denied petitioners' suggestion for rehearing en banc. Pet. App. 27a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, the decision of the court of appeals is the first federal decision addressing the question. The panel's decision comports with the vast majority of decided cases addressing the general question of whether attorney-client privilege fully survives the client's death. It closely tracks the virtually unanimous views advocated by the ALI, by commentators such as McCormick, Wright & Graham, Wolfram, Mueller & Kirkpatrick, and by legal luminaries such as Learned Hand.

Given the novelty of the issue in the federal courts of appeals, and the court of appeals' decision to carefully follow the body of law and commentary, review here is unwarranted, especially inasmuch as the case arises in the midst of an ongoing grand jury investigation.

I

Preliminarily, we take note of an important prudential consideration: This Court's review would further delay an important grand jury investigation which touches on vital matters of public concern. *The grand jury subpoena was issued over 26 months ago*, yet there still has not been a final judicial resolution. Delay of this magnitude seriously impedes a grand jury investigation. This Court's review—on a narrow issue of first impression with no circuit split—would cause further lengthy delays. Because "extended litigation" impedes the "orderly progress of an investigation," *United States v. Calandra*, 414 U.S. 338, 349 (1974), and "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws," *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991), federal courts attempt to avoid the "protracted interruption of grand jury proceedings," *Calandra*, 414 U.S. at 350.

The dictates of this Court's Rule 10 are clearly not met. There is no circuit split. The decision below does not conflict with any decision of the Supreme Court or any other federal court. Indeed, the decision is the *first* federal case addressing whether the attorney-client privilege applies in federal *criminal* proceedings after the client's death. As the dearth of case law suggests, the issue is exceedingly narrow, and the court of appeals' resolution of it will have no effect on attorney-client privilege in *civil* litigation. The novelty and the narrowness of the issue counsel hesitation before this Court exercises its discretionary certiorari jurisdiction.

1. Before this case, no federal court had ever had occasion to rule on whether the attorney-client priv-

ilege applies in federal criminal proceedings after the client's death. In attempting to manufacture an inter-circuit conflict, petitioners claim that the decision conflicts with two Ninth Circuit decisions. Pet. 10. Both of those decisions, however, are *civil* cases. The court of appeals in this case stated explicitly that its decision applies solely to *criminal* cases: "We reject a general balancing test in all but this narrow circumstance"—namely, "use in criminal proceedings after death of the client." Pet. App. 8a.

2. The court's decision accords with the vast majority of cases addressing whether the attorney-client privilege survives death outside the context of a federal criminal investigation. The question has arisen most frequently in state decisions. Almost all of the cases have involved disputes over a will. Pet. App. 3a (95% of cases raising the issue have been testamentary disputes). In these testamentary cases, state and federal courts have consistently held that the privilege does *not* survive death. *See id.* The operation of the attorney-client privilege thus has been "nullified in the class of cases where it would most often be asserted after death." *McCormick on Evidence* § 94, at 348 (4th ed. 1992); *see also* 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380 (2d ed. 1994) (privilege "inapplicable" in cases where the communications "are most likely to be sought"). The court's conclusion that the privilege does not automatically apply after the client's death in criminal proceedings follows *a fortiori* from the vast body of case law holding that the privilege does not apply after death in testamentary disputes. As this Court has stated, the need for evidence is "particularly applicable to grand jury proceedings." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). That conclusion

follows as well from the deeply rooted principle that an evidentiary privilege, which "obstructs the truth-finding process," must be "narrowly construed." Pet. App. 6a. Because the attorney-client privilege "has the effect of withholding relevant information from the factfinder, it applies only where *necessary* to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976) (emphasis added). Given that courts have consistently found that it is not necessary to apply the privilege after death in testamentary cases, it logically follows that it is not necessary to apply the privilege after death in criminal cases—circumstances which arise less frequently and present a far more compelling need for evidence.[1]

In the state courts, only a handful of criminal cases have addressed this issue, with several concluding that the privilege does not apply after death. In *State v. Gause*, 489 P.2d 830 (Ariz. 1971), for ex-

[1] Petitioners suggest that any privilege must apply uniformly in all proceedings (civil and criminal), Pet. 11, but that argument flies in the face of settled law. Many privileges are applied in a context-specific manner and carry less weight in criminal proceedings than in other settings. They include, for example, the Executive privilege for Presidential communications, *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974); the governmental privilege for deliberative processes; the qualified reporter's privilege; and the informer's privilege.

Petitioners' separate suggestion that privileges must be recognized to the same extent in state and federal court, Pet. 10, is likewise contrary to Supreme Court precedent. *See United States v. Gillock*, 445 U.S. 360, 368 (1980) (state evidentiary privilege "which Gillock could assert in a criminal prosecution in state court does not compel an analogous privilege in a federal prosecution"); *Trammel v. United States*, 445 U.S. 40, 49 (1980) (declining to recognize adverse spousal testimony privilege although 24 states did so).

ample, the defendant was found guilty of murdering his wife and was sentenced to death. The Arizona Supreme Court held that the attorney-client privilege did not require exclusion of statements made by the wife to her attorney before her death. A similar scenario was presented in *State v. Kump*, 301 P.2d 808 (Wyo. 1956). The Wyoming Supreme Court held the statements admissible, stating that "[w]e can conceive of no public policy which would exclude the communications such as are involved in this case."[2] *Id.* at 815. Of the few civil cases outside the testamentary context, the only case with meaningful analysis concluded that the privilege does not survive death. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

In sum, the cases that have actually decided this privilege issue overwhelmingly accord with the decision of the court of appeals. *See* Pet. App. 3a; *see also* Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Leg. Ethics 45, 58 n.65 (1992) (95% of cases arise in testamentary context, where privilege does not apply after death).

[2] In the three other state supreme court cases that have decided the issue, the courts held that the privilege applies after death, although there were dissents in two of those cases. *See In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 72 (Mass. 1990) (Nolan, J., dissenting), advocating "limited exception to the privilege . . . where the interests of the client are so insignificant and the interests of justice in obtaining the information so compelling"); *State v. Macumber*, 544 P.2d 1084, 1088 (Ariz. 1976) (Holahan, J. and Cameron, C.J., dissenting) ("When the client died there was no chance of prosecution for other crimes . . . . Opposed to the property interest of the deceased client is the vital interest of the accused in this case in defending himself against the charge of first degree murder.").

The court of appeals correctly found that "there is little by way of judicial holding that affirms the survival of the privilege after death." Pet. App. 4a. Moreover, the "relatively rare" cases that "do actually apply it give little revelation of whatever reasoning may have explained the outcome." Pet. App. 3a; *see also Frankel* at 57 n.63 ("only a few judicial opinions offer[] any extensive discussion").[3]

3. The court of appeals decision follows the approach advocated by the American Law Institute and the vast majority of commentators. The Restatement of the Law Governing Lawyers states that allowing posthumous disclosure "would do little to inhibit clients from confiding in their lawyers." Restatement (Third) of the Law Governing Lawyers § 127 comment d (March 29, 1996). McCormick opposed continuation of the privilege after death, stating: "[T]o hold that in all cases death terminates the privilege . . . could not in any substantial degree lessen the encouragement for free disclosure which

[3] Petitioners suggest that several evidence codes have held the privilege applies after death in perpetuity. Pet. 13-14. That is incorrect, as the court of appeals explained. Pet. App. 4a n.2, 9a. To begin with, most codes addressing the issue contain a rule that the attorney-client privilege does not apply in testamentary disputes, the very situation in which the issue most often arises. Some state and model codes also indicate that the privilege may be asserted by the personal representative of the client, but as the court stated, "the framing of the posthumous privilege as belonging to the client's estate or personal representative both suggests that the privilege may terminate on the winding up of the estate and reflects a primary focus on civil litigation." Pet. App. 4a. These provisions thus say nothing about the appropriate rule in criminal proceedings in which, unlike in civil proceedings, neither the client nor the client's estate is subject to liability.

is the purpose of the privilege." McCormick § 94, at 350. Learned Hand also opposed the privilege after death, saying that "a communicant who dies can have no more interests except in a remote way." 19 *ALI Proceedings*, 1942, at 143. The views of Mueller & Kirkpatrick are similar: "Few clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense." 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380. Wright & Graham concur, stating that "the typical client" would not have "much concern for how posterity may view his communications." 24 Wright & Graham, *Federal Practice and Procedure* § 5498, at 484 (1986). Wolfram also noted the oddity of holding that the privilege does not continue in testamentary cases but that it does in other cases. Wolfram, *Modern Legal Ethics* § 6.3.4, at 256 (1986).

4. The court of appeals decision carefully analyzes and accommodates the competing policy goals of (i) obtaining relevant evidence and (ii) protecting the traditional common-law privileged relationship. On the one hand, application of the privilege after the client's death would have far more serious consequences than application of the privilege before death. After a client's death, there will be "a loss of crucial information because the client is no longer available to be asked what he knows." 24 Wright & Graham § 5498, at 484; *see also* Wolfram at 256 (application after death "in effect gives an expanded scope to the privilege"). As the court of appeals reasoned, the death of the client thus not only eliminates a vital source of information; it also negates a longstanding justification for the attorney-client privilege: that

the client can be questioned directly about the relevant factual events. Pet. App. 7a.

On the other side of the ledger, the federal attorney-client privilege—which is not a constitutional command but a creature of federal rule—assures the client that certain communications to his attorney cannot be used in federal criminal or civil proceedings. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege thus tends to encourage full and frank communications from client to attorney and thereby furthers the policy of ensuring that clients receive effective legal advice. The court's decision does not dilute that policy, however, because the client no longer faces criminal liability after his death, when the communications would be disclosed. *See* Pet. App. 6a ("criminal liability will have ceased altogether").

Petitioners respond that a client may be less forthcoming in communications to his attorney, even if assured that they cannot be used against him to impose criminal or civil liability, because of a fear that posthumous disclosure of his communications would adversely affect his reputation or interests of others about whom the client cares. Pet. 8, 15. This argument suffers from a fundamental flaw: The client's interest in his own reputation and in protecting friends and associates from liability cannot justify nondisclosure of information after death because it does not justify nondisclosure of information before death. When the client is alive, *he must testify truthfully as to all facts—regardless of how harmful those facts are to his reputation or to the interests of others. See United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975) ("Testimony demanded of a witness

may be very private indeed").[4] And the client who testifies must disclose the same factual information that he disclosed to his attorney; the attorney cannot stand pat if the client commits perjury.[5] After the client's death, the attorney simply would disclose the same factual information that the client himself would have disclosed had the client been alive. Given this reality, petitioners' argument based on reputation and protecting others has no more force with respect to post-death application of the privilege than it does with respect to the client's duty to testify truthfully when he is alive.

Moreover, the courts have rejected petitioners' chilling-effect argument in testamentary cases—the very situation where the communications disclosed are the most sensitive and personal imaginable. "Estate planning . . . may be based on considerations one would prefer never to reveal." *Hitt v. Stephens*, 675 N.E.2d 275, 279 (Ill. App. 1997). For example, as the court noted here, "a decedent might want to provide for an illegitimate child but at the same time much prefer

[4] The client can assert the Fifth Amendment privilege but only to protect himself from compelled self-incrimination, not to protect himself from embarrassment or to protect others. Moreover, the client who interposes the Fifth Amendment privilege can be immunized and then must testify truthfully as to all relevant facts.

[5] *See* D.C. Rules of Professional Conduct 3.3(a)(4), (b); Model Rules of Professional Conduct 3.3(a)-(b) & comment 6 to Rule 3.3 ("an advocate must disclose the existence of the client's deception to the court or to the other party" except when client is criminal defendant). By communicating a particular version of facts to his attorney, the client essentially commits himself to that same version of facts if he subsequently testifies.

that the relationship go undisclosed." Pet. App. 9a. The will-contest situation thus is "the one occasion *above all others* when a client is likely to be moved to silence in conversations with a lawyer if the client becomes aware that disclosures can be made after the client's death." Wolfram at 256 (emphasis added). Yet the courts have consistently held that the need to settle disputes over wills trumps any such interest in reputation or privacy, and that the attorney-client privilege does not apply after death in such cases.[6]

Furthermore, empirical support for petitioners' argument is nonexistent. *See* Frankel at 61 (available empirical evidence "tells us little"); *cf. Branzburg*, 408 U.S. at 693-694 (rejecting First Amendment privilege claims where "[e]stimates of the inhibiting effect of such subpoenas . . . are widely divergent and to a great extent speculative"). Petitioners' many suggestions that Mr. Foster would have wanted to conceal the truth of this matter are speculative at best. As the court of appeals stated, Mr. Foster, like others, might "view history's claims to truth as more deserving." Pet. App. 7a. Moreover, because the court's decision is limited to the criminal context, cases where the situation will arise are so rare—as reflected in the fact that this is the first federal case ever litigated—that any hypothesized chilling effect would be minimal. *See id.* ("To the extent, then, that any post-death restriction of the

[6] Petitioners attempt to explain those cases by suggesting that testators actually intended for attorney-client communications to be disclosed after death. Pet. 11. They are wrong. The court below and the commentators have correctly rejected that *post hoc* rationalization, for it is, in fact, highly unlikely that all testators actually intend that such communications be disclosed. *See* Pet. App. 9a; Wolfram at 256.

privilege can be confined to the realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil."); *cf. Nixon*, 418 U.S. at 712 ("we cannot conclude that advisers [to the President] will be moved to temper the candor of their remarks by the infrequent occasions of disclosure" in criminal proceedings). Even if there were a marginal chilling effect in certain cases, this Court has consistently concluded that a marginal chilling effect on a protected constitutional or common-law privilege is outweighed by the interest in obtaining relevant evidence for criminal proceedings.[7]

5. The implications of petitioners' position warrant brief mention. Those implications are best understood by examining the kinds of situations where the issue can arise and has arisen.

Suppose, for example, that a crime has occurred and that there are two suspects, one of whom is now deceased but had previously communicated to an attorney. That suspect's communications to the attorney could exculpate the still-living suspect. Under petitioners' approach, courts could not compel disclosure of that information—despite the manifest injustice that could result. *See State v. Macumber*, 544 P.2d 1084 (presenting those facts).

[7] *See Nixon*, 418 U.S. at 712 (rejecting Executive privilege claim although Court acknowledges that the President and his advisers need to communicate confidentially); *Branzburg*, 408 U.S. at 693 (rejecting First Amendment privilege claim although "argument that the flow of news will be diminished . . . is not irrational"); *see also University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990) (rejecting First Amendment privilege claim although accepting that "confidentiality is important to proper functioning of the peer review process").

Similarly, a now-deceased witness might have observed the commission of a crime and discussed it with his attorney. Again, the information provided by the witness could exculpate or inculpate another person, but petitioners' absolutist approach nonetheless could prevent disclosure. *Cf. Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (presenting similar scenario in civil context).

Or a wife battered by her husband might recount to her attorney the husband's threats to her life. Under petitioners' approach, if the wife were then found beaten to death, the courts could not require disclosure of the information she had communicated to the attorney, despite the manifest injustice that could result. *See State v. Gause*, 489 P.2d 830; *State v. Kump*, 301 P.2d 808 (addressing issue on those facts).

No policy reason justifies these predictable results flowing from petitioners' desired culture of permanent secrecy. These examples of the severe harm that petitioners' proposed secrecy rule would generate illustrate powerfully why the vast majority of courts, the ALI, and respected commentators have rejected it.[8]

II

Petitioners also seek review on the work product issue. The court of appeals concluded that an attor-

[8] Petitioners now, for the first time, apparently are willing to carve out exceptions *ad hoc* for various of these situations to make their drastic position more palatable. Pet. 11-12. But the many exceptions that petitioners allow do no more than expose the hollowness of their legal theory. The only coherent rationale justifying petitioners' tolerance of numerous "exceptions" is that they are not this case. That hardly is a persuasive position.

ney's notes of an interview with a deceased witness are not protected from disclosure under all circumstances. The federal courts of appeals that have addressed the issue have reached the same conclusion. See *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) (requiring production of attorney memoranda of interview with deceased employee). Likewise, the Restatement provides that courts may order production of "notes in redacted form" when the "notes of an interview contain[] both the recollections of the witness and the thoughts of the lawyer who made the notes." Restatement § 138 comment c. Petitioners cite not a single case reaching the contrary conclusion, and their argument has no support in law or policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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Introduction

Defending the Court of Appeals decision, Independent Counsel asserts, as did that court (over Judge Tatel's compelling dissent), that the new rule it announced will not chill attorney-client communications. Four major attorney organizations that have filed amicus briefs—the American Bar Association, the American College of Trial Lawyers, The National Association of Criminal Defense Lawyers, and the American Corporate Counsel Association—strongly disagree. These organizations rely not on the views of commentators—as does the Court of Appeals' majority and Independent Counsel—but on the innumerable experiences of thousands of their members, which confirm that the majority's new rule would have a pronounced chilling effect.

The National Hospice Organization also has filed an amicus brief. The members of this organization reason—as does the ABA's Commission on Legal Problems of the Elderly, which supports the ABA's brief—that the majority's opinion effectively discriminates against persons who, anticipating death, wish to consult a lawyer in confidence about criminal matters.

The reason and experience these knowledgeable groups bring to the issue are significant. Federal Rule of Evidence 501 mandates that application of the attorney-client privilege "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." Except for a brief citation in "Questions Presented," Independent Counsel ignores this rule. This disregard is not surprising, because the position Independent Counsel supports wars with the experience of seasoned, practicing lawyers. It also conflicts with the reason and experience reflected in virtually all non-testamentary state decisions on the issue, and the twenty-six state statutes which recognize that the privilege survives death. None of these decisions or statutes makes any distinction between civil and criminal matters. As this Court said in *Jaffee v. Redmond*, 116 S.Ct. 1923, 1930 (1996), "it is

appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience'."

Independent Counsel ignores this passage from *Jaffee*—indeed, he does not even cite the case—just as he overlooks *Jaffee*'s emphasis on the importance of uniformity between federal and state decisions on privileges issues.[1] He further disregards *Jaffee*'s admonition that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of [a person's] interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id.* at 1932. This, of course, is precisely the effect of the after-the-fact balancing test announced by the Court of Appeals' majority, which also is condemned by the observation in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) that "[a]n uncertain privilege . . . is little better than no privilege at all."

Attorney-Client Issue

1. Independent Counsel argues that the issue of posthumous disclosure of client communications in criminal cases is "novel[]" and "narrow." Br. at 7. But the issue is not that "novel." Seven states have held that the privilege survives death in criminal cases.[2] A federal court of appeals (in two cases) and at least 13 state courts have held in civil cases that the privilege survives death, with no suggestion that criminal cases require a contrary rule.[3] Nor is the issue "novel" in the commentaries, which all concede that under the common-law rule—whatever its wisdom (an issue on which commentators

[1] Otherwise "any State's promise of confidentiality would have little value." *Jaffee*, 116 S.Ct. at 1930.

[2] The cases are cited in the Petition at 10 n.4.

[3] The cases are cited in the Petition at 10 ns.5 and 6. And there are dicta to this effect in other cases, including federal cases. See Petition at 13 n.12.

split)—the privilege survives death, with no hint that criminal cases are different.

However, the case is "novel" in the sense that, contrary to this Court's admonitions, the lower court adopted a balancing test for an "absolute" privilege. It is especially novel because *no one* (not even the commentators on which Independent Counsel relies) ever has suggested, prior to this case, that it would be rational to bar disclosure of privileged conversations in civil cases after the client's death, but not in criminal cases where the potential consequences are much more severe. And the case is "novel" because the court below has created a new and irrational exception to a well-established rule. Because the rule is important to our legal system and the proposed exception has no rational basis, such "novelty" should argue for, not bar, review.

Nor is the decision below "narrow," even if limited to criminal cases. Innumerable attorney-client discussions involving potential criminal implications occur daily. The decision below affects those conversations, particularly where the client is elderly, ill, or otherwise anticipates death in the near future. Under the decision below, for example, persons who are elderly or seriously ill cannot talk to an attorney in confidence about a child whom they suspect may be dealing in drugs. A decision having an immediate and significant impact on a broad range of everyday occurrences is not "narrow."

2. Echoing the majority (Pet. App. 6a), Independent Counsel says that, after the client dies, "neither the client nor the client's estate is subject to liability" in a criminal proceeding. Br. at 11 n.3. That statement is wrong, for a client's estate may be decimated as a result of criminal proceedings after his or her death. For example, a child's drug activities could lead to civil forfeiture of estate property. *See, United States v. One Parcel of Property at 31-33 York St.*, 930 F.2d 139 (2d Cir. 1991); *cf. Bennis v. Michigan*, 516 U.S. 442 (1996). Moreover, disclosure could cause investigation, prosecution, or conviction of an

be so much more injurious than in civil proceedings, *non-disclosure* follows *a fortiori* from the rule that posthumous disclosure is not allowed in civil cases.

5. Citing *State v. Gause* 489 P.2d 830 (Ariz. 1971) and *State* v. *Kump*, 301 P.2d 808 (Wyo. 1956), Independent Counsel suggests (Br. at 9) that these two cases hold, as a general proposition, that "the privilege does not apply after death." This is not so; those cases held that, in the circumstances involved, a husband accused of murdering his wife could not assert her attorney-client privilege where he either had a conflict of interest or lacked authority.[7] Here Independent Counsel does not question the authority of Mr. Hamilton (who also represents the Foster family) to assert the privilege. In so doing, Mr. Hamilton is not only carrying out the intent of Mr. Foster and his family, but also is fulfilling his ethical obligation to protect confidential client disclosures.[8]

The *Gause* and *Kump* cases are significant (as is the *Magraw* case cited in n.7) because they demonstrate that courts will find acceptable means to deal with unjust situations without doing harm to the attorney-client privilege. So also, in the circumstance when a criminal *defendant's* constitutional right to a fair trial is affected by application of the privilege, a court might find a limited solution.[9] But this is not this case. Here a *prosecutor*, not a criminal defendant, seeks to violate the privilege.[10] The

[7] *See State v. Gause, supra,* 489 P.2d at 834: "Where such a conflict of interest existed . . . the privilege could not be claimed." *See also District Attorney v. Magraw,* 628 N.E.2d 24 (Mass. 1994) (where husband accused of murdering his wife is her executor and refuses to waive her attorney-client and psychotherapist-patient privileges, district attorney may petition the probate court to remove him on ground that he cannot make a disinterested waiver decision).

[8] *See Restatement (Third) of the Law Governing Lawyers* (March 29, 1996) § 127 comment c: "A lawyer for a client who has died has a continuing obligation to assert the privilege."

[9] *See* Petition at 12.

[10] To allow a prosecutor to do so in the name of a grand jury's constitutional right to investigate would throw open the flood gates.

Court can decide this case without reaching the issue of a defendant's constitutional rights. A ruling here for Petitioners will not produce the parade of horribles conjured up by Independent Counsel. But real harm looms to the privilege—and to the administration of justice that depends on lawyers' obtaining the unvarnished truth from their clients—if the lower court decision is allowed to stand.

6. Independent Counsel disputes that the new rule will make clients less willing to confide in their attorneys. His reasoning is curious; he states that the client's interest in his reputation and in protecting his family and associates cannot justify non-disclosure after death because it does not justify non-disclosure before death. This is so, he says, because the living client must testify truthfully (perhaps under grant of immunity) and the lawyer must disclose his client's deception if he does not.

This argument attacks the basic concept of the privilege—that it permits the client to impart information to his attorney in confidence. By suggesting that the information provided to attorneys necessarily will be disclosed, even if the client lives, Independent Counsel in effect contends that the privilege is meaningless.

But he is wrong. The fact is that the contents of attorney-client communications normally will be kept confidential. While the client must testify truthfully about underlying facts, he is not required to reveal *the content of his conversation* with his attorney. Any seasoned practicing lawyer knows that clients impart many matters to their attorneys besides "facts"—*e.g.*, their fears, doubts, speculations, emotions, theories, intentions, and the like. Such thoughts may never be revealed in testimony, and it generally is accepted that the lawyer must hold them confidential, whether the client lives or dies.

Moreover, while immunity is possible, there may be numerous reasons it will not be given by the government. And while an attorney in some circumstances must dis-

close a client's deception, this will happen rarely and even then disclosure will be limited.[11]

7. Independent Counsel argues that there is no "empirical support" for Petitioners' chilling effect argument (and then goes on to assert, with no support other than the opinion below, that changing the rule would have only a "minimal" effect on client candor). Br. at 15. Judge Tatel's response to this argument is conclusive: "because the Independent Counsel himself urges overturning the common law rule, and because that rule rests on the proposition that preserving the attorney-client privilege after the client's death is necessary to promote client disclosure, the Independent Counsel bears the responsibility of producing evidence to the contrary." Pet. App. 29a.[12]

In *Upjohn*, this Court, without citing "empirical support," drew on "reason and experience" to conclude that a proposed restriction on the privilege as applied to corporations would chill client candor, thus "discouraging the communication of relevant information" to the attorney and making it more difficult for the attorney "to formulate sound advice." 449 U.S. at 391-93. "Reason and experience" (the standard embodied in Rule 501) support the same conclusion here. Experience (including the experience of *amici's* many thousands of members) teaches that possible violations of the law, by friends and associates as well as the client, are a frequent subject of

[11] *See Model Rules of Professional Conduct*, Rule 3.3 anno.: "Within the bounds of the Rule prohibiting any affirmative misrepresentations, a lawyer need not disclose all the weaknesses in the client's case, nor must the lawyer correct every error of opposing counsel or the court."

[12] In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the argument was that the First Amendment required a news reporter's privilege because of an impermissible chilling effect, but the Court cited the lack of empirical evidence in declining to create such a privilege. 408 U.S. at 693-94. Similarly, a court should decline to denigrate a well-recognized privilege supported by reason and experience in the absence of compelling empirical evidence that the premise underlying the privilege is seriously flawed.

attorney-client conversations. Similar experience also teaches that people care about what happens after they die, because they, for example, write wills, establish trusts, endow chairs, establish foundations, buy life insurance and burial plots, and write memoirs. And while most people may not "anticipate [death] in an immediate or definite sense," [13] experience teaches that many elderly, severely ill or suicidal people do. Such people have a right to seek confidential legal advice. "Reason and experience" support the conclusion that they would not speak to an attorney in confidence if told their statements would be available to a prosecutor after death.

Work-Product Issue

As to the work product issue, Independent Counsel does not even attempt to justify the court of appeals' extraordinary holding that an attorney's notes of an initial interview are producible "under the ordinary Rule 26(b)(3) standard" because they must be presumed not to contain opinion work product, whose production demands a much higher standard. Pet. App. 13a-14a. Independent Counsel's reticence is understandable because there is a clear conflict between the majority's position that notes of an initial interview with a client may *never* constitute opinion work product and the large number of cases—including *Upjohn* and *Hickman*, which Independent Counsel does not even cite in this regard—which declare that attorney notes are entitled to heightened protection and may never be produced or only produced in the rarest of circumstances. This conflict counsels review by this Court, particularly because the ramifications of the majority's holding are harmful to the practice of law.

Independent Counsel does rely on two court of appeals decisions, but neither is pertinent. One case held that the government had made a sufficient showing of necessity, in light of the witness's death and other factors, to meet the *higher* standard of necessity applicable to opinion work

[13] *See* Independent Counsel Brief at 12, quoting 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380.

product. *In re Grand Jury Investigation*, 599 F.2d 1224, 1230-32 (3d Cir. 1979). The other case merely reflects a factual determination by the court (not based on a presumption) that the interview notes did not reflect the attorney's opinions. *In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982).

Independent Counsel also cites the Restatement's position that factual portions of interview notes may be produced, where redaction is feasible. *Restatement, supra*, § 138 comment c. Moreover, the court of appeals directed redaction of those portions of the notes that are "protected by . . . the work-product privilege." Pet. App. 14a. But this does not salvage the majority's opinion. Even if only the "facts" selected by Mr. Hamilton to record are produced upon an ordinary showing of need, that result still runs counter to the numerous opinions of this Court and other federal courts holding that such a product of an attorney's thought processes is entitled to heightened protection.[14]

Conclusion

The Petition for Certiorari should be granted.[15]

Respectfully submitted,

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February 27, 1998

[14] Petition at 18-19.

[15] Independent Counsel contends that this Court should deny certiorari to speed the conclusion of his investigations. It appears, however, that his investigations will not end until long after this Court, if it determines to review this case, decides it. Petitioners would not object to expedited treatment for this case.

No. 97-1192

In the Supreme Court of the United States

OCTOBER TERM, 1997

SWIDLER & BERLIN, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN CORPORATE COUNSEL ASSOCIATION, AND NATIONAL HOSPICE ORGANIZATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members throughout the United States. Founded in 1958, NACDL seeks to promote the effective representation of defendants in criminal cases. The attorney-client and work-product issues in this case are central to NACDL's members and their clients. NACDL has appeared as *amicus curiae* in several cases in this Court. See, *e.g.*, *Hudson* v. *United States*, 118 S. Ct. 488 (1997); *Moran* v. *Burbine*, 475 U.S. 412 (1986).

The American Corporate Counsel Association is a non-profit national bar association for in-house corporate counsel. Since its founding in 1982, ACCA has grown to more than 10,600 members in approximately 4,600 corporations and other private-sector organizations. The attorney-client and especially the work-product issues presented in this case are of direct concern to ACCA's members and the clients they represent. ACCA has participated as *amicus curiae* in a number of cases before this Court. See, *e.g.*, *Virginia Bankshares* v. *Sandberg*, cert. granted, 495 U.S. 903 (1990), rev'd, 501 U.S. 1083 (1991); *Frazier* v. *Heebe*, cert. granted, 479 U.S. 960 (1986), rev'd, 482 U.S. 641 (1987).

The National Hospice Organization is a non-profit, public-benefit, charitable organization dedicated to meeting the unique needs of terminally ill people and their families. Established in 1978, NHO represents approximately 2,400 hospice programs, some 4,000 hospice professionals, and 48 state hospice organizations. In addition to the physical, spiritual, social, and emotional care and support provided by hospices, people in the final stage of life often need legal services, and the attorney-client issue in this case therefore is of particular concern to NHO, its members, and

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[1] The parties have consented to the filing of this brief under S. Ct. R. 37.2, and their letters of consent have been lodged with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

those they serve. NHO has previously appeared as *amicus curiae* in this Court. See, *e.g.*, *Vacco* v. *Quill*, 117 S. Ct. 2293 (1997); *Washington* v. *Glucksberg*, 117 S. Ct. 2258 (1997).

ARGUMENT

A divided panel of the D.C. Circuit, over the vigorous dissent of Judge Tatel, has incorrectly decided two issues involving the attorney-client and work-product privileges that are of surpassing importance to our adversarial system of justice and to the legal profession and the clients it represents. Both of the panel's rulings are unprecedented and conflict with an unbroken line of decisions of this and other courts over many decades. Moreover, the issues presented are recurring ones for the legal system and arise routinely in the practice of law. In light of the panel's error, its departure from established precedent, and the continuing importance of these issues for lawyers and clients alike, review by this Court is warranted. See *Jaffee* v. *Redmond*, 116 S. Ct. 1923, 1927 (1996). Indeed, either issue, considered separately, would justify the grant of certiorari; taken together, they compellingly call for this Court's intervention to forestall the pernicious consequences of the novel rulings below. As Judge Tatel explained, the majority's "two new holdings—one chilling client disclosure, the other chilling lawyer note-taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process." Pet. App. 32a–33a (Tatel, J., dissenting from denial of rehearing in banc).

I. THE ABSOLUTE ATTORNEY-CLIENT PRIVILEGE SURVIVES THE DEATH OF THE CLIENT.

In this case, the Independent Counsel obtained grand-jury subpoenas for notes of a meeting between James Hamilton, a private attorney, and his client, Vincent W. Foster, Jr., who was then a White House official and who, nine days after the meeting, committed suicide. It is common ground in this case that their discussion, when it occurred, was covered by the attorney-client privilege. Pet. App. 2a. Thus, the notes of the meeting were subject to subpoena only because the court of appeals held that the death of the client qualifies what would otherwise be an absolute

privilege and that an *ad hoc* balancing test determines whether the post-death qualified privilege is outweighed by the need for the material in the criminal investigation.

The court of appeals' decision cannot withstand analysis. Much of the court's reasoning is flatly inconsistent with the settled understanding of the attorney-client privilege. Moreover, none of the reasons advanced by the majority remotely justifies a departure from the established rule, endorsed by courts and legislatures alike, that the privilege survives the death of the client.

This issue, *amici* stress, will arise on a frequent and even daily basis in the legal system if the court of appeals' decision is left standing. Most directly, it will be presented, as here, when material or information is sought to be compelled after the death of the client. By itself, that is a significant and recurring issue. But the issue also will present itself *every time* a lawyer counsels a client on the privileged nature of their communications and a client must decide, in light of the privilege available, whether to make a full and candid disclosure to his (or her) lawyer of the most highly incriminating, embarrassing, or otherwise sensitive facts the client possesses. As Judge Tatel aptly observed in dissent (Pet. App. 20a–21a), the attorney no longer can provide assurance that proper attorney-client communications (that is, not in furtherance of a crime or fraud) will be absolutely privileged, but instead must give much more complex and qualified advice that the privilege ultimately depends on a *post-hoc* and free-form balancing test that will turn on circumstances that cannot then be foreseen. The consequence of the court of appeals' decision is to confront clients—who already are facing some legal problem for which they are seeking professional assistance—with uncertain and confusing advice about the privilege that in the end can be little more than cold comfort. The ruling thus has an immediate and direct effect on the everyday practice of law and the routine decisions that clients make, and it unavoidably will deter candid client disclosures that, until now, were encouraged by the absolute attorney-client privilege.

A. An Absolute Attorney-Client Privilege Serves To Encourage Complete And Candid Communications By Clients, And The Common Law And Evidence Codes Recognize That The Privilege Does Not Abate Upon The Death Of The Client.

As this Court has recognized, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). The fundamental purpose of the privilege "is to encourage full and frank communications between attorneys and their clients"; it "'rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out'" and is essential to enable the client to be free "'to make full disclosure to their attorneys.'" *Ibid.* In this way, the privilege "'promote[s the] public interests in the observance of law and administration of justice.'" *Ibid.* In sum, the privilege reflects both that "sound legal advice or advocacy serves public ends," and that "such advice or advocacy depends upon the lawyer's being fully informed by the client * * * [which will occur only when the client is] 'free from the consequences or the apprehension of disclosure.'" *Ibid.* See also *Jaffee*, 116 S. Ct. at 1928 (the attorney-client privilege is "'rooted in the imperative need for confidence and trust,'" and "the mere possibility of disclosure * * * [that] may cause embarrassment or disgrace * * * may impede development of the confidential relationship").

With striking uniformity, the law long has recognized that the absolute attorney-client privilege continues after the death of the client. As Judge Tatel demonstrated in detail below, "[s]ince at least the mid-nineteenth century, the common law has protected the attorney-client privilege after a client's death" (Pet. App. 17a), and courts and legislatures consistently have adhered to that principle. This Court has ruled that the privilege survives the client's death,[2] as have lower federal courts[3] and state courts[4] as well as

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[2] See *Glover* v. *Patten*, 165 U.S. 394, 406–408 (1897). See also *Chirac* v. *Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826) (Story, J.) ("confidential communications between client and attorney, are not to be revealed at any time"); *Blackburn* v. *Crawfords*, 70 U.S. (3 Wall.) 175, 192–194 (1865).

[3] See, *e.g.*, *United States* v. *Osborn*, 561 F.2d 1334, 1340 (9th Cir. 1977); *Baldwin* v. *CIR*, 125 F.2d 812, 814 (9th Cir. 1942); see also *Talley Indus., Inc.* v. *United States*, 188 U.S.P.Q. (BNA) 368, 371–373 (Ct. Cl. 1975) (corporation's attorney-client privilege survives dissolution of the corporation).

[4] See, *e.g.*, *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 70–72 (Mass. 1990).

English courts.[5] In addition, each of the 20 state legislatures to have addressed the issue has provided that the absolute attorney-client privilege does not abate upon the death of the client.[6] Similarly, the Rules of Evidence proposed by this Court in 1972 maintained the privilege after the client's death,[7] as have other model evidence codes.[8] And the American Bar Association and a number of commentators likewise have endorsed this common-law rule.[9] These consistent authorities convincingly establish that the privi-

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[5] See *Bullivant* v. *Attorney-General for Victoria*, 1901 App. Cas. 196, 206 (appeal taken from Q.B.); 13 HALSBURY'S LAWS OF ENGLAND para. 84 at 67 (4th ed. 1975).

[6] See Pet. App. 17a (Tatel, J., dissenting).

[7] See Proposed Fed. R. Evid. 503(c) & adv. comm. note (d)(2), 56 F.R.D. 183, 236, 240 (1972).

[8] See Unif. R. Evid. 502(c) (1986); Model Code of Evid. R. 209(c)(i) & cmt. 6 (1942).

[9] See American Bar Ass'n, FORMAL OPINION 91 (Mar. 8, 1933); American Bar Ass'n, INFORMAL OPINION 1293 (June 17, 1974); 8 John H. Wigmore, EVIDENCE § 2323 at 630–631 (McNaughton rev. ed. 1961); Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45 (1992); Section of Litigation, American Bar Ass'n, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 234 (3d ed. 1996); Paul R. Rice, THE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §§ 2:5–2:6 (1993). Even commentators who criticize the rule recognize that it is firmly established and that a contrary rule is not supported by judicial or legislative authority. See, *e.g.*, PROPOSED RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 & cmts. c & d, Reporter's Note to Comments c & d (Proposed Final Draft No. 1, Mar. 29, 1996) (provision that attorney-client privilege survives the death of the client; although the commentary urges an exception, it acknowledges that "[t]he law recognizes no exception," that cases "routinely hold that the privilege survives," and that "[n]o extant case authority supports the proposed good-cause exception urged in the Comment").

lege continues after the client's death under "the principles of the common law * * * interpreted in the light of reason and experience." Fed. R. Evid. 501; see also *Jaffee*, 116 S. Ct. at 1927 (provision in Proposed Federal Rules of Evidence for psychotherapist privilege supported adoption of federal privilege as a matter of common law under Fed. R. Evid. 501); *id.* at 1929 & n.11 (uniform acceptance of psychotherapist privilege by state courts and legislatures supported adoption of federal common-law privilege under Rule 501).[10]

As these authorities demonstrate, the lesson of history and experience—grounded in human nature and common sense—has been that abrogation of the absolute attorney-client privilege upon the death of the client would discourage the full and forthright disclosure by the client to the attorney that the privilege is designed to promote. Absent a continued privilege, clients would be subject to "the consequences or the apprehension of disclosure" (*Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888)) that—as the basic theory of the privilege recognizes—chills candid and complete communication.

> The subjective freedom of the client, which it is the purpose of the privilege to secure, * * * could not be attained if the client understood that, * * * after the client's death, the attorney could be compelled to disclose the confidences * * *. It has therefore never been questioned * * * that the privilege continues * * * even after the death of the client.

Wigmore, § 2323 at 630–631.

Against this background, it is clear that the unprecedented decision below departs from a century of well-accepted privilege law and thus creates a conflict that necessitates this Court's review.

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[10] The solitary exception is, as Judge Tatel described it (Pet. App. 29a (Tatel, J., dissenting from denial of rehearing in banc)), "a never-cited opinion of a mid-level Pennsylvania appellate court." See *Cohen* v. *Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976). This aberrational decision—which was not even a criminal case—does not support the panel's ruling in this case and does not even begin to offset the overwhelming weight of contrary authority.

B. The Panel Erred In Holding That The Death Of The Client Results In A Qualified Attorney-Client Privilege In Criminal Cases.

1. The panel's reasoning is inconsistent with the fundamental principles underlying the attorney-client privilege.

The decision below rests on a number of conclusions that are irreconcilable with the basic and long-accepted premises of the attorney-client privilege. Although couched in terms of an exception to the privilege upon the death of the client, the panel's reasoning is, in reality, at odds with the foundations of the privilege itself.

To begin with, the majority stressed that "the privilege obstructs the truth-finding process" and therefore must be "narrowly construed." Pet. App. 6a. However, the consistent judgment of history and experience has been that the privilege is essential to the sound administration of justice and must be applied to accomplish its paramount purposes. See page 4, *supra*; *Jaffee*, 116 S. Ct. at 1928. Moreover, contrary to the panel's reasoning, this Court has recognized that complete and candid disclosures are unlikely to occur in the first place without the protections of the privilege, and therefore "[a]pplication of the attorney-client privilege to communications such as those involved here * * * puts the adversary in no worse position than if the communications had never taken place." *Upjohn*, 449 U.S. at 395; see also *Jaffee*, 116 S. Ct. at 1929 ("[T]he likely evidentiary benefit that would result from denial of the privilege is modest" because "[w]ithout a privilege, much of the desirable evidence to which litigants * * * seek access * * * is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged"); *id.* at 1928; *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 803 n.23 (1984).

In addition, the majority suggested that "[i]n the sort of high-adrenalin situation likely to provoke consultation with counsel," the client has adequate incentives to make full disclosure to his lawyer even if the communication is not covered by an absolute

attorney-client privilege. Pet. App. 7a. This Court, however, has squarely rejected such reasoning: "the common law has recognized the value of the privilege in further facilitating communications" notwithstanding that "an individual trying to comply with the law or faced with a legal problem * * * has strong incentive to disclose information to his lawyer." *Upjohn*, 449 U.S. at 393 n.2.

The majority also reasoned that the privilege should not continue after the client's death because the client was no longer available as an alternative source of the information. Pet. App. 7a. But the possibility of obtaining the desired information from a source other than the attorney has never been the basis for the privilege. See Pet. App. 25a (Tatel, J., dissenting) (discussing numerous situations where attorney-client privilege would apply even though information was not otherwise available). Moreover, the possibility of eliciting the information directly from the client during his lifetime is considerably more theoretical than real; while it is conceivable that the client in a criminal investigation would waive the attorney-client privilege (which also could be done by the representative of the client after the client's death), or would relinquish his Fifth Amendment right against self-incrimination through waiver or a grant of immunity from the prosecutor, such circumstances are rare and the prospect of their occurrence remote. In the end, the attorney-client privilege rests not on the improbable assumption that the evidence sought from the lawyer will be available from the client, but on the twin principles that such evidence is unlikely to come into existence at all absent the privilege (see page 7, *supra*) and that any marginal unavailability of evidence is a price worth paying for the overriding benefits of the privilege to the legal system (see page 4, *supra*).

Finally, the majority concluded that the post-death privilege in criminal cases is governed by "a case-by-case balancing" to determine whether the "relative importance [of the communications sought] is substantial" because they "bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence." Pet. App. 8a, 10a. Once again, this Court has refused to adopt an *ad hoc* balancing test for the attorney-client privilege, holding that such an amorphous standard is antithetical to the certainty necessary for an effective privilege:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Upjohn, 449 U.S. at 393; see also *Jaffee*, 116 S. Ct. at 1932 (rejecting balancing test for psychotherapist privilege because "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege"). Unavoidably, the outcome of a balancing test that turns on such factors as the relative importance of the evidence to the individual case and the availability of the evidence from other sources cannot be predicted *ex ante* at the time of the attorney-client communication and indeed can lead to inconsistent decisions by courts in similar circumstances. See *Upjohn*, 449 U.S. at 393. Accordingly, contrary to the panel's blithe assurance that its case-by-case balancing approach "produces none of the murkiness that persuaded the [Supreme] Court in *Upjohn* and *Jaffee* to reject the limitations proposed here" (Pet. App. 10a), it is clear that the decision below creates exactly such murkiness and is incompatible with the long-recognized need for an absolute rather than a qualified privilege to safeguard attorney-client communications.

2. A qualified posthumous privilege in criminal cases will deter full and candid communications by clients.

Central to the majority's holding was the belief that a "discrete exception" to the absolute attorney-client privilege that created a "posthumous limitation of the privilege" would not deter full and candid disclosures by clients to their attorneys. Pet. App. 8a. In particular, in the majority's view, clients would not be sufficiently concerned about the harm to their reputations from the posthumous revelation of incriminating or embarrassing information that they would be discouraged from imparting such information to

their lawyers in the first place. According to the majority, "we would expect the restriction's chilling effect to fall somewhere between modest and nil." *Id.* at 7a. This is a completely unrealistic assessment that is belied by the law of privilege and the lessons of human experience.

First of all, the majority entirely ignored the client's concern over the effects of the posthumous disclosure of incriminating or embarrassing information about himself on his family, friends, and colleagues. Needless to say, such disclosures can be devastating to survivors. So, too, the panel overlooked that a client's communications can—and often do—contain incriminating or embarrassing information about others, including his loved ones and associates. The disclosure of such information to a prosecutor after the client's death can expose these third parties not only to disgrace but to criminal prosecution. And, in addition to other sanctions, such proceedings can have enormous financial implications for his survivors due to fines, restitution, forfeiture, and even attorneys' fees. These consequences alone could well discourage a client's candid discussions with his lawyer in the absence of an absolute posthumous privilege. See Pet. App. 24a (Tatel, J., dissenting); American Bar Ass'n, INFORMAL OPINION 1293 (June 17, 1974) (posthumous disclosure of confidential information conveyed by the client "could lead to numerous serious problems involving the client's representatives, surviving relatives and business associates" and "would be in contravention of the very purpose of the privilege"); Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE § 199 at 380 (2d ed. 1994) ("[c]learly a client is concerned not only about himself but about his larger human situation that includes spouses, parents, children, siblings, and extended family, friends, and business associates").[11]

[11] It is, of course, irrelevant, that such statements concerning others may not be protected by the client's Fifth Amendment privilege against self-incrimination. The attorney-client privilege is broader than the self-incrimination privilege, and the relevant issue is whether the client's concerns about family and friends would affect his voluntary communications with his attorney absent a continuation of the absolute privilege after his death.

Beyond that, the panel plainly was mistaken in minimizing people's concern about their posthumous reputations and the deterrent effect that can have on frankness and truthfulness. As discussed above, it long has been recognized that the absolute attorney-client privilege survives the client's death and that this continuing privilege is necessary to ensure candid communications between the client and his lawyer during the client's life. The panel's conclusion flies in the face of the accumulated wisdom embodied in this rule. By itself, this is enough to cast the gravest doubt on the decision below.

What is more, other absolute privileges follow exactly the same rule that the privilege survives the death of the declarant who holds the privilege. Thus, the priest-penitent privilege,[12] the doctor-patient privilege,[13] the psychotherapist-patient privilege,[14] and the spousal privilege for confidential communications[15] all continue unabated after the death of the speaker. This unanimity in privilege law—which the panel did not consider, let alone distinguish—provides telling confirmation of the need for the post-death continuation of an absolute privilege in order to encourage the *inter vivos* communication of highly sensitive information.

In addition to the law of privilege, numerous fields of human endeavor attest to the importance the living attach to their reputations after death. From time immemorial, literature, philosophy, religion, and other disciplines have recognized this human characteristic. For example, the Bible states:

> All these were honored in their generations, and were the glory of their times.

[12] See Proposed Fed. R. Evid. 506(c) & adv. comm. note (c), 56 F.R.D. at 247, 249; *Ryan* v. *Ryan*, 642 N.E.2d 1028, 1034 (Mass. 1994).

[13] See *Jewell* v. *Holzer Hosp. Found.*, 899 F.2d 1507, 1513–1514 (6th Cir. 1990); *Prink* v. *Rockefeller Ctr., Inc.*, 398 N.E.2d 517, 520 (N.Y. 1979); Wigmore, § 2387 at 853 ("The object of the privilege is to secure subjectively the patient's freedom from apprehension of disclosure. It is therefore to be preserved even after the death of the patient").

[14] See Proposed Fed. R. Evid. 504(a), 56 F.R.D. at 241.

[15] See *Prink*, 398 N.E.2d at 520; Wigmore, § 2341 at 673.

> There be of them, that have left a name behind them, that their praises might be reported.
>
> And some there be, which have no memorial; who had perished, as though they had never been; and are become as though they had never been born; and their children after them. [16]

Writers such as Longfellow likewise have recognized the value people place on their reputations after death:

> Lives of great men all remind us
> We can make our lives sublime.
> And, departing, leave behind us
> Footprints on the sands of time.[17]

Thus, in the words of Shakespeare: "Mine honor is my life; both grow in one; Take honor from me and my life is done."[18]

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[16] THE BIBLE: Apocrypha, at 44:7–9, quoted in John Bartlett, FAMILIAR QUOTATIONS 32:14 (16th ed. 1992). See also *id.*, Ecclesiastes 7:1, quoted in Bartlett at 24:6 ("[a] good name is better than precious ointment"); Leonidas of Tarentum, in THE GREEK ANTHOLOGY, no. 189 (Jay ed. 1973), quoted in Bartlett at 83:1 ("Far from Italy, far from my native Tarentum I lie; and this is the worst of it—worse than death. An exile's life is no life. But the Muses loved me. For my suffering they gave me a honeyed gift: My name survives me. Thanks to the sweet muses, Leonidas will echo throughout all time"); Juvenal, SATIRES, VIII, *l.* 83, quoted in Bartlett at 109:6 ("Count it the greatest sin to prefer life to honor, and for the sake of living to lose what makes life worth having"); Publilius Syrus, MAXIMS 108, 265, quoted in Bartlett at 99:2, 9 ("A good reputation is more valuable than money"; "What is left when honor is lost?").

[17] H. Longfellow, A PSALM OF LIFE st. 7, quoted in Bartlett at 440:17.

[18] W. Shakespeare, KING RICHARD THE SECOND, act I, sc. i., *l.* 182, quoted in Bartlett 170:26. See also *id.*, *l.* 177, quoted in Bartlett at 170:25. ("[t]he purest treasure mortal times afford [i]s spotless reputation"); W. Shakespeare, OTHELLO, II, iii, 264, quoted in Bartlett at 206:20 ("Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial"); *id.*, III, iii, 155, quoted in Bartlett at 206:30 ("Good name in man and woman, dear my lord, [i]s the immediate jewel of their souls; Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name [r]obs me of that which not enriches him, [a]nd makes me poor indeed"); M. de Cervantes, DON QUIXOTE DE LA MANCHA, pt. I, bk. IV, ch. 1, p. 226, quoted in Bartlett at 150:4 ("My honor is dearer to me than my life").

This natural human concern manifests itself in numerous ways. For example, Judge Tatel noted the many acts of philanthropy that indicate "that human beings care deeply about how posterity will view them." Pet. App. 22a–23a (Tatel, J., dissenting). A particularly vivid example is that of Alfred Nobel, the inventor of dynamite and founder of the Nobel Prize. Upon the premature report of his death, Nobel was criticized as a "'merchant of death' who had built a fortune by discovering new ways to 'mutilate and kill.'" This

> pained him so much he never forgot it. Indeed, he became so obsessed with his posthumous reputation that he rewrote his last will, bequeathing most of his fortune to a cause upon which no future obituary writer would be able to cast aspersions.

Kenne Fant, ALFRED NOBEL 207 (Ruuth transl. 1993). See also Nicholas Halasz, NOBEL 3–4 (1959).

Similarly, concerns about posterity and the post-death revelation of private information are evidenced in people's treatment of historical materials. Readers of autobiographies and memoirs are familiar with the common focus of authors on their enduring reputations and the judgment of history. What is more, such concerns have led numerous public officials to destroy their papers in anticipation of their deaths. For example, Justice Black, in what was termed "Operation Frustrate the Historians," directed on the eve of his death that his Court papers be destroyed.[19] A number of other justices also have destroyed their papers,[20] as have several

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[19] See Roger K. Newman, HUGO BLACK 621–622 (1994); see also Alexandra K. Wigdor, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES 48 (1986) (Justice Black ordered the destruction of his conference notes because of the "'fear that publishing them might inhibit the free exchange of ideas'" and because "'reports by one Justice of another's conduct in the heat of a difference might unfairly and inaccurately reflect history'"); *id.* at 34.

[20] See Wigdor at 4 ("until recently, judges have tended to destroy their working papers"). Chief Justice White and Justices Cardozo, McKenna, Minton, Peckham, Pitney, and Roberts destroyed their papers, and the papers of Justices Lurton and Wayne were destroyed by their survivors. *Id.* at 25 n.50, 35, 73, 140, 141, 154, 168, 169, 175, 219, 221.

presidents.[21] And many prominent private citizens as well have done the same thing.[22] Although human motivations are complex and sometimes difficult to ascertain, this experience is sufficient to belie the facile assumption of the majority below that the post-death disclosure of incriminating or embarrassing information would have little or no effect in discouraging candid attorney-client discussions.

As the foregoing demonstrates, it is a normal human trait to be concerned about one's reputation after death, and *amici* submit that people in general would be deterred from candid attorney-client communications by the knowledge that, under the panel's decision, the familiar privilege does not in fact protect against highly sensitive post-death disclosures. This deterrent effect would be especially great where, as apparently was the case here, the client consults the lawyer in contemplation of death. See Pet. App. 23a, 24a–25a (Tatel, J., dissenting); cf. *Jaffee*, 116 S. Ct. at 1929 & n.10. When death is expected or imminent—whether from advanced age, illness, suicide, or other cause—the client understandably is most likely to have in mind the way he will be remembered by his family, friends, business associates, and community in general. It is fanciful to say, as the panel did, that he would be unconcerned about his post-death reputation and undeterred by the prospect of disclosure of attorney-client communications. See Pet. App. 5a ("'[f]ew clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense'"). While the privilege is not limited to this situation, these

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[21] See Carl McGowan, *Presidents and Their Papers*, 68 MINN. L. REV. 409, 412–413 (1983); *Nixon* v. *United States*, 978 F.2d 1269, 1279–1280, 1287–1297 (D.C. Cir. 1992).

[22] See Frankel, 6 GEO. J. LEGAL ETHICS at 62 n.86 (" '[c]ontemplating their ultimate exits, Henry James, Walt Whitman, Charles Dickens and many others put their correspondence and private papers in the fire out of fear that some biographer might get hold of them'"); Karl E. Meyer, *Need a Sure Way to Settle an Argument Or Hide a Scandal? Burn the Letters*, N.Y. TIMES, Feb. 9, 1998, at A17.

circumstances make plain the error in the court of appeals' reasoning.[23]

Similarly, concern about post-death reputation is likely to be particularly significant where the client's professional life was founded on his good name. Here, for example, the client was himself a lawyer and, as such, his "professional reputation * * * [was his] most important and valuable asset." *Walker* v. *City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997); see also *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part) ("most lawyers are wise enough to know that their most precious asset is their professional reputation"). In fact, it is painfully clear that the client in this case placed the highest value on his reputation at the bar and in his community.[24] It thus blinks reality to sweep aside, as the majority below did, the concern of clients for their reputations after death.

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[23] In fact, as the district court emphasized (Pet. App. 41a), "one of the first notations on the document is the word: 'Privileged.'" See also *id.* at 25a (Tatel, J., dissenting) (representation by counsel that "'I am totally certain * * * [that i]f I had not assured Mr. Foster that our conversation was a privileged conversation, we would not have had the conversation and there would be no notes that are the subject of the situation today'").

[24] In a commencement address to his law school *alma mater* shortly before his death, he observed the following:

> The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy. * * * I cannot make this point to you too strongly. There is no victory, no advantage, no fee, no favor which is worth even a blemish on your reputation for intellect and integrity. * * * Dents to the reputation in the legal profession are irreparable.

Vincent W. Foster, Jr., "Roads We Should Travel," Commencement Address at the Law School of the University of Arkansas (May 8, 1993), reprinted in Robert B. Fiske, Jr., REPORT OF THE INDEPENDENT COUNSEL: IN RE VINCENT W. FOSTER, JR. (June 30, 1994), app. 7. Likewise, in a note written around the time of his death, he expressed his deep concern that "in Washington * * * ruining people is considered sport." *Id.*, app. 5. Based on this and other evidence, the Fiske Report concluded that "[h]is professional reputation was of paramount importance to him." *Id.* at 8. See also Kenneth W. Starr, REPORT OF THE OFFICE OF INDEPENDENT COUNSEL ON THE DEATH OF VINCENT W. FOSTER, JR. 98 (1997) (his "'public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance'").

II. THE STRINGENT PROTECTION FOR MENTAL-IMPRESSION WORK PRODUCT APPLIES TO THE LAWYER'S NOTES OF HIS PRELIMINARY MEETING WITH THE CLIENT.

The majority below also held that the lawyer's notes of his meeting with his client were not protected by the attorney work-product privilege. The panel reasoned that factual materials contained in the lawyer's notes did not reflect the lawyer's mental impressions, thought processes, or strategies because "the interview was a preliminary one initiated by the client" and thus "the lawyer ha[d] not sharply focused or weeded the materials." Pet. App. 13a, 14a. Accordingly, it held that disclosure of factual materials in the subpoenaed notes was governed by the relatively lax work-product standard for purely factual materials—which "merely shifts the standard presumption in favor of discovery, so that [such materials] are discoverable where the person seeking discovery * * * [makes] a showing of 'substantial need' and 'the inability to obtain the substantial equivalent of the information . . . from other sources without "undue hardship"'" (*id.* at 11a–12a)—rather than by the stringent standard for mental-impression work product.

The majority's decision was patently erroneous and reflects a wholly unrealistic view of the responsibility and functioning of the legal profession. Moreover, it conflicts with decisions of other courts that have recognized that the disclosure of factual materials can reveal an attorney's mental processes and therefore is subject to the most stringent work-product standard. A lawyer's notes of a meeting with a client that otherwise fall within the safeguards for mental-impression work product, as here, do not lose that protection simply because the meeting was a preliminary one requested by the client.

Unlike the attorney-client issue discussed above, the work-product question is not limited to situations in which the client has died. Nor is it limited to criminal cases but applies to civil litigation as well. Furthermore, preliminary client meetings occur across the country on a daily basis for lawyers of all kinds—private practitioners, in-house counsel, and even government attorneys. The decision below will have an immediate and detrimental effect on this day-to-day practice of law; just as the panel's attorney-

client decision will deter clients from candid communications with their lawyers, so, too, its work-product decision will deter lawyers from "taking notes at early, critical meetings with clients," which "[n]ot only will * * * damage the ability of lawyers to represent their clients but in the end [will mean that] there will be no notes [to discover]." Pet. App. 31a (Tatel, J., dissenting from denial of rehearing in banc). Finally, the panel's ruling will breed a disruptive and wasteful generation of work-product litigation as lawyers and courts struggle to determine what is meant by such elastic and undefined terms as a "preliminary" meeting or a "focus[ing] or weed[ing]" of the facts. In these circumstances, further review by this Court is called for. See Pet. App. 37a (district court's observation that the work-product question is the "most important issue" raised in this case).

A. A Strict Work-Product Privilege For An Attorney's Mental Impressions Is Essential To Our System Of Justice And Applies To The Disclosure Of Factual Information In An Attorney's Notes That Would Reveal His Thoughts And Judgments.

The work-product privilege recognizes that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman* v. *Taylor*, 329 U.S. 495, 510–511 (1947). Without such a doctrine, "[t]he effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.* at 511. In particular, absent work-product protection, "much of what is now put down in writing would remain unwritten." *Ibid.* The work-product "doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system." *United States* v. *Nobles*, 422 U.S. 225, 238 (1975).

As this Court summarized in *Upjohn*, the work-product doctrine imposes a stringent standard of protection for the mental processes of attorneys. Some courts have adopted an absolute rule

that "no showing" can overcome the privilege for such materials; other courts, while "declining to adopt an absolute rule," nonetheless have held that "such material is entitled to special protection" and is discoverable "'only in a rare situation.'" 449 U.S. at 401.[25] By contrast, as the panel below observed, factual information is subject to a less stringent balancing standard that takes account of the need for the information and its availability from other sources.

Notwithstanding this general division between mental impressions and facts, it is clear that the disclosure of factual materials in a lawyer's notes can reveal his mental impressions. For example, the factual information that a lawyer elicits from the client as helpful (or harmful) readily provides an open window into the lawyer's strategy and his judgments about the strengths and weaknesses of the case. See *Hickman*, 329 U.S. at 511 ("[p]roper preparation of a client's case demands that [the lawyer] assemble information"); *Upjohn*, 449 U.S. at 391 ("'a lawyer should be fully informed of all the facts of the matter he is handling'") (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY). In addition, the information the lawyer distills and chooses to memorialize from all that the client says also exposes his thought processes. See *Upjohn*, 449 U.S. at 399–400 (attorney's notes reflect "'what he saw fit to write down regarding witnesses' remarks'" and "'would be his [the attorney's] language, permeated with his inferences'"); *id.* at 391 ("'[i]t is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant'") (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY); *Hickman*, 329 U.S. at 511 (attorney must "sift what he considers to be the relevant from the irrelevant facts"); see also *Kalina* v. *Fletcher*, 118 S. Ct. 502, 510 (1997) ("the selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate").

In light of these practical realities, this Court has held that "[f]orcing an attorney to disclose notes and memoranda of wit-

[25] In *Upjohn*, the Court found it unnecessary to resolve which of these two strict standards applies to mental-impression work product. 449 U.S. at 401–402.

nesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Upjohn*, 449 U.S. at 399. Consistent with *Upjohn*, a number of courts of appeals have recognized that the compelled disclosure of factual information in an attorney's notes that will divulge his mental processes is subject to the stringent work-product standard of absolute or near-absolute protection. See, *e.g.*, *In re Allen*, 106 F.3d 582, 607–608 (4th Cir. 1997), cert. denied, 118 S. Ct. 689 (1998); *Cox* v. *Administrator, U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995); *In re Grand Jury Proceedings*, 473 F.2d 840, 841–842, 848 (8th Cir. 1973). By instead applying the much less strict standard of need and alternative availability that relates to purely factual materials, the decision below is both erroneous and a departure from the law of other circuits.[26]

B. Because The Attorney Exercises His Professional Judgment In The Information He Elicits And Records, A Lesser Work-Product Privilege Does Not Apply To His Initial Meeting With A Client.

Contrary to the decision below, a lesser work-product standard does not apply here simply because this was a "preliminary [meeting] initiated by the client." Pet. App. 13a. Indeed, after *in camera* review (*id.* at 39a), the district court determined that the notes "'reflect the mental impressions'" of the attorney. *Id.* at 12a.

Even in a "preliminary" meeting, and no less in one "initiated by the client," the lawyer brings to bear his professional judgment and experience in representing his client in anticipation of litigation. See Pet. App. 30a–31a (Tatel, J., dissenting from denial of rehearing in banc). Although the discussion may be, as the panel

[26] Similarly, in applying the work-product and deliberative-process doctrines under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), courts have held that otherwise disclosable facts that reveal protected thought processes or deliberations are exempt from disclosure. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *EPA* v. *Mink*, 410 U.S. 73, 91 (1973); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Petroleum Information Corp.* v. *Department of Interior*, 976 F.2d 1429, 1434–1436 (D.C. Cir. 1992); *Nadler* v. *Department of Justice*, 955 F.2d 1479, 1491–1492 (11th Cir. 1992); *Bristol-Myers Co.* v. *FTC*, 598 F.2d 18, 29–30 n.23 (D.C. Cir. 1978); *Kent Corp.* v. *NLRB*, 530 F.2d 612, 624 (5th Cir.), cert. denied, 429 U.S. 920 (1976).

suggested, "a fairly wide-ranging discourse from the client" (*id.* at 13a), that is not in any way inconsistent with the lawyer's professional efforts to elicit the information—pro and con—that he considers significant in formulating his strategy and planning future steps. Nor is the need for a "wide-ranging" discussion inconsistent with the lawyer's exercise of professional judgment as reflected in his decisions to include some but not other information in his notes, his choice of language to record the information, and his interlineated or marginal comments and questions that accompany the information. In this case, for instance, the lawyer—a highly experienced attorney in criminal cases—took only three pages of notes during a two-hour interview, thereby exercising considerable professional judgment as to what to write down, and he underlined and placed check marks and question marks by certain passages that he believed important for any number of possible reasons or future uses. See *id.* at 31a (Tatel, J., dissenting from denial of rehearing in banc). Moreover, the record establishes (*id.* at 40a), as would be expected, that the attorney in fact prepared for the initial meeting with the client by reviewing materials and making notes, and thus he brought not only his experience but also his own information, questions, and legal opinions—however tentative or fragmentary—to the meeting.

In short, to say, as the panel did, that lawyers do not "sharply focus[ ] or weed[ ]" the facts at a "preliminary" client meeting in order to facilitate a "wide-ranging" discussion (Pet. App. 14a, 13a) is simply out of touch with the experience of practicing members of the bar. Even at an initial conference, the lawyer is exercising his professional judgment in both the information he elicits and the information he takes down. This process of obtaining and recording information is at the heart of the work-product privilege and is entitled to the most stringent protections.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 97-1192

In The

Supreme Court of the United States

October Term, 1997

SWIDLER & BERLIN AND
JAMES HAMILTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The American College of Trial Lawyers files this brief as *amicus curiae* pursuant to the written consent of the parties.[1]

INTEREST OF AMICUS CURIAE

The American College of Trial Lawyers (the "College"), an organization of lawyers in this country and Canada that are skilled and experienced in the trial of cases, seeks to improve and enhance the standards of trial practice, the administration of justice and the ethics of the profession. Membership in the College is by invitation. The College strives to induct as Fellow lawyers from the top rank of the trial bar of each jurisdiction. The College limits membership to one percent of the number of persons admitted to practice in any particular state. To qualify as a Fellow, a lawyer must have at least fifteen years of trial experience.

Concern for the preservation of the attorney-client privilege motivates the College to submit this brief. The College considers the privilege a critical feature of our adversary system of justice. The College's Board of

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or its counsel.

Regents has authorized the College to seek *amicus curiae* participation in support of the petition for certiorari because the issues presented fundamentally affect the relationship between lawyer and client, the administration of justice and the conduct of the legal profession.

The petition and opposition filed by the parties set forth the particular facts of this case and their respective interests in the litigation. The impact of the decision below, however, extends far beyond the parties to this litigation. It will create a substantial gap in the attorney-client privilege by providing that, in certain criminal cases, the privilege does not survive the death of the client. This decision, which runs counter to more than a century of precedent, will have drastic and unfortunate implications for the legal profession and the administration of justice. Accordingly, the College files this brief *amicus curiae* to present the considerations of broader policy with which it is particularly concerned, as well as its view regarding the sweeping, negative impact that is likely to result from the Court of Appeals decision.

REASONS FOR GRANTING THE PETITION

The College urges the Court to grant a writ of certiorari because the decision of the District of Columbia Circuit raises issues of fundamental importance concerning the scope of the attorney-client privilege and has implications for attorney-client relations far beyond its narrow factual context. A brief description of these implications follows.

a. The Court of Appeals decision is sweeping in its geographic scope. Although the decision only provides for disclosure of attorney-client communications in federal criminal proceedings pending in the District of Columbia, there is no limitation on the locus of these communications. Thus, the decision will inhibit client communications across the nation.

Indeed, since federal criminal proceedings in the District of Columbia often concern (i) acts of elected or appointed officials who are in the District only temporarily to serve in federal government positions, or (ii) private individuals from outside the District based upon their dealings with federal government officials in the District, it is likely that many of the privileged communications that will be disclosed as a result of the Court of Appeals opinion will have occurred outside of the District. Application of the Court of Appeals opinion to require disclosure of such client communications will preclude the clients from relying upon the laws of their home states, which are almost certain to provide that the privilege survives the death of the client. *See* Pet. at 13 n.13 (citing state statutes); Pet. App. 17a (Court of Appeals dissenting opinion).

The evisceration of state privilege laws that will result from the Court of Appeals opinion is of great concern because, as this Court has previously reasoned, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930 (1996). Additionally, "any State's promise of confidentiality would have little value if the [client] were aware that the privilege would not be honored in a federal court. Denial

of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.*

b. The Court of Appeals establishes an exception to the long-standing common law rule without any factual or legal support. In announcing a standard far easier to state than to apply, the court declares that its "object . . . is to maximize the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes." Pet. App. 6a. As a threshold matter, the notion that any effort to create an exception to the privilege warrants a fresh policy assessment of the pros and cons of disclosure stands in stark contrast to hundreds of years of authority according absolute protection for attorney-client communications apart from a few, well-defined exceptions such as the crime-fraud and testamentary exceptions. But even assuming that "maximizing the sum of the benefits of confidential communications and those of finding the truth" represents the proper approach, the court's application of that standard leaves much to be desired. Far from undertaking this inquiry with the precision suggested by the court's formulation, the court proceeds without any empirical evidence to support its central conclusion that clients are unlikely to be inhibited by posthumous disclosure of their communications to attorneys in subsequent criminal proceedings.

Nor does the court identify any cases or statutes supporting its interpretation of the privilege, stressing instead the purported absence of an articulated rationale in the long line of authority supporting survival of the privilege after death as a basis for ignoring this body of

precedent. Essentially, the Court of Appeals creates a presumption against the privilege, burdening its proponents with the task of demonstrating its validity. This approach might be warranted if a new privilege was being created, but given the long and virtually unbroken history of precedent supporting survival of the attorney-client privilege after death, the onus should be on those proposing a departure from the long-standing common law rule to justify the change.

c. The court's central assumption – that clients will be indifferent to posthumous disclosure of their communications in criminal proceedings because such disclosure cannot affect them directly – is troubling in several respects. First, it is counterintuitive. Experience teaches that clients care deeply about many posthumous subjects that do not affect them tangibly, such as their reputations after death and legal consequences that might befall friends and family. Clients speak often to lawyers about these subjects, and value highly the confidential nature of these conversations. The Court of Appeals acknowledges this concern in suggesting that posthumous disclosure of client communications in civil proceedings may not be appropriate because clients have a "motive to preserve their estates" and thus would be troubled by disclosure of privileged communications that might affect their estates. Pet. App. 6a.

The Court of Appeals' reasoning applies with at least equal force in the criminal context. A client troubled about the effect of posthumous disclosure on the size of a bequest for a relative will be equally if not more troubled about the possibility that such disclosure could land the

relative in prison. Yet under the Court of Appeals decision, a client fearing criminal liability for a child, for example, will be unable to confide in a lawyer about that risk.

d. The logic of the Court of Appeals' assumption that clients are indifferent to posthumous disclosure could support a wide variety of additional exceptions to the privilege. As noted, this assumption rests on the faulty premise that clients only care about events that affect them personally. There is no logical basis to limit this premise to criminal liability. It is just as natural to suppose that clients will have no concern about the fate of their businesses or the size of their estates after death because at that point they will be no more personally affected by developments in these areas than in a subsequent criminal proceeding. Thus, the Court of Appeals' rationale would logically support expansion of its exception to posthumous disclosure in all civil proceedings.

There are also practical circumstances in which the Court of Appeals' distinction between civil and criminal cases will prove unworkable. For example, a criminal proceeding against a client's child may result in a civil forfeiture action against the client's property. *See, e.g., United States v. One Parcel of Property at 31-33 York Street*, 930 F.2d 139 (2d Cir. 1991) (affirming forfeiture of house belonging to mother following arrest of her sons for drug sales allegedly conducted from the house). In such a case, introduction of a communication as evidence in a criminal proceeding may unavoidably affect a civil proceeding as well, thereby preventing the client from claiming the benefit of the privilege in that proceeding.

The court's alternative rationale for its exception – that posthumous disclosure is needed to obtain truthful testimony because the client is unavailable to testify – has equal potential to lead to further erosion of the privilege. As pointed out in Judge Tatel's dissent, death is not the only circumstance in which a witness is unavailable. "Witnesses unable to remember facts, incompetent to testify, or beyond the court's process likewise deny relevant information to the factfinder." Pet. App. 25a. Moreover, "[t]he unavailability of a witness likewise does no greater harm to the factfinding process than an available witness who testifies inaccurately." *Id.* Accordingly, the rationale that truthful evidence must be adduced contains significant potential for expansion of the Court of Appeals' exception.

e. The significance of the Court of Appeals opinion is unlikely to be reduced by the court's creation of a balancing test to determine whether posthumous disclosure is justified in the particular case. The inherently unpredictable and post-hoc nature of the Court of Appeals' balancing test will create ambiguity concerning the scope of the privilege. Accordingly, no lawyer will be able to offer any assurance to a client that a future court will apply the test to deny disclosure of that client's communications. On the contrary, a lawyer will be bound to warn the client of the prospect of posthumous disclosure along the lines set forth in Judge Tatel's dissent. Pet. App. 20a (lawyer must warn client that "when you die, I could be forced to testify – against your interests – in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution"). The Court of Appeals' amorphous balancing test thus creates the very problem

that led this Court to reject the "control group" test for the attorney-client privilege in the corporate context – that "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

The Court of Appeals' efforts to create a narrow exception will have an additional negative consequence. For every time a prosecutor is able to convince a trial judge that the privileged information sought is "substantially important" to a pending criminal proceeding, there will be hundreds if not thousands of instances in which clients will have been deterred from confiding in their lawyers for fear of posthumous disclosure. Thus, though the Court of Appeals seeks to craft a narrow exception, the aggregate costs of inhibiting full and frank client communications will far exceed any benefits to the truth-seeking process.

CONCLUSION

For the reasons stated in the petition for certiorari and in this amicus curiae brief in support of that petition, the College urges that the petition be granted.

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No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, when a client dies, the attorney-client privilege in a criminal proceeding is no longer absolute, but is subject to a balancing test that requires the attorney to produce evidence of privileged communications with the client if they "bear on a significant aspect" of the case "as to which there is a scarcity of reliable evidence."

2. Whether, as a matter of law, an attorney's handwritten notes taken during an initial interview with a client do not receive the virtually absolute work product protection otherwise afforded to an attorney's "mental impressions," because at this stage the lawyer "has not sharply focused or weeded the materials" and exercised professional judgment as to what to record.

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INTEREST OF THE AMICUS CURIAE

Amicus curiae, the American Bar Association, has a keen interest in attorney-client confidentiality, which is directly affected by issues, such as those presented here, involving the scope of the attorney-client privilege and the attorney work-product doctrine.[1] The many members of the ABA who practice law are directly affected by decisions limiting the scope of the privilege and requiring production of communications with their clients, and their relationships with their clients feel the impact of such decisions.

The ABA has long taken a leading role in developing standards governing the obligation of attorneys to maintain the confidences of their clients. In 1908, the ABA adopted its Canons of Professional Ethics, providing in Canon 37 that "[i]t is the duty of a lawyer to preserve his client's confidences" and that "[t]his duty outlasts the lawyer's employment." The ABA's Model Code of Professional Responsibility, adopted in 1969, similarly required a lawyer to protect confidences and secrets of a client both while the representation continued and after it ended. The Model Rules of Professional Conduct promulgated by the ABA in 1983, which reflect the ABA's current policy on confidentiality, continue to provide that the obligation to preserve confidences remains intact after the termination of the attorney-client relationship. The ABA's Standing Committee on Ethics and Professional Responsibility has taken the view that this obligation continues after the death of the client.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission.

The ABA recognizes that the ethical obligation to preserve client confidences and the legal protections embodied in the attorney-client privilege and work-product doctrine are related and serve the same general goals. Indeed, without these legal protections, the lawyer's ethical obligation to preserve confidences could be considerably impaired. As Comment [5] to ABA Model Rule 1.6 explains:

> The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

Because of this interrelationship between the privilege and the ethical principles it reinforces, the ABA necessarily takes an interest in important issues involving the scope of the privilege.

In addition, through its Litigation and Criminal Justice Sections, the ABA seeks to define the roles of lawyers in civil and criminal litigation and to improve the civil and criminal justice systems. The issues presented in this case directly implicate these goals. The ABA also seeks, through its Commission on Legal Problems of the Elderly, to improve legal services for the elderly—an objective affected by this case insofar as the rule laid down by the lower court, by weakening the attorney-client privilege after the death of the client, may have a significant effect on the elderly and others who seek legal services in anticipation of their own death.

These interests lead the ABA to support the petitioners' position that this Court should decide the issues presented in

this case, for the reasons stated below.[2] Both the petitioners and the respondent have consented to the filing of this brief.

REASONS FOR GRANTING THE WRIT

I.
THE D.C. CIRCUIT'S NOVEL HOLDING LIMITING THE ATTORNEY-CLIENT PRIVILEGE AFTER THE CLIENT'S DEATH PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE

The decision of the United States Court of Appeals for the District of Columbia Circuit marks a substantial departure from the "principles of the common law" as they have historically been "interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. The decision below represents the first time a federal court has ruled that the death of a client so weakens the attorney-client privilege that it may be overcome, at least in a criminal proceeding, on the basis of a court's balancing of the government's claimed need for privileged information against the client's interest in confidentiality.

This novel ruling has the potential to affect attorney-client relationships far beyond the borders of the District of Columbia and to impair the goals of the ethical principles that require attorneys to protect client confidences. It undermines

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

the certainty of clients and attorneys nationwide that their communications will remain confidential, and it may confound many thousands of persons who, anticipating their own death, seek the advice of attorneys to assist in ordering their affairs.

Indeed, it is fair to assume that hundreds of thousands if not millions of Americans live today—in hospitals, nursing homes, hospices, or in their own homes—in the expectation that they may soon die, whether from disease, old age, or occupational perils, or—like the client in this case—by their own hands. Many of these people undoubtedly have secrets and confidences that, if revealed, would be at the least highly embarrassing themselves or their friends and loved ones. These might include wrongs done to others by themselves, their friends, or members of their families; hidden assets or financial transactions; or illegitimate children or relationships. Countless other examples could be given.

The attorney-client privilege exists in large part because disclosure to lawyers of secrets such as these enables people to obtain advice and assistance to guide future action or to rectify or ameliorate the consequences of past actions. Absent the assurance of confidentiality, such disclosures likely would never be made. The existence and integrity of the attorney-client privilege does not obstruct the truth-finding process. Instead, it promotes disclosure of the truth to lawyers and fosters actions available under the law to redress wrongs that might otherwise be left undiscovered and unaddressed. Decisions such as the one below threaten to impede these important aims.

A decision with such a far-reaching impact on the attorney-client relationship, on the legal profession, and on the administration of justice merits review by this Court. It clearly presents, in the words of this Court's Rule 10(c), "an important question of federal law that has not been, but

should be, settled by this Court." Thousands of lawyers in this country have long believed that the privilege continues to protect client confidences after the client's death. Whether they are wrong, or whether federal courts will continue to recognize this protection, is a matter this Court should decide.

A. The Importance of the Privilege

This Court has long recognized the significant public policies served by the attorney-client privilege and the importance of the privilege to the administration of justice under law:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated ... in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of

> justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

The American Bar Association has similarly emphasized the critical importance of attorney-client confidentiality, and has promulgated model ethical standards that reinforce the obligation of confidentiality that is protected by the privilege. The official comments to Rule 1.6 of the ABA's Model Rules of Professional Conduct describe the policies underlying the ethical requirement of attorney-client confidentiality in terms that parallel those used by this Court in *Upjohn*:

> [2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
>
> [3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.
>
> [4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and

> frankly with the lawyer even as to embarrassing or legally damaging subject matter.

B. The Traditional Rule

The attorney-client privilege, and the parallel ethical obligation to preserve client confidences, have traditionally not been thought to be temporally limited. Comment 22 to the ABA's Model Rule 1.6 expresses the general principle: "The duty of confidentiality continues after the client-lawyer relationship has terminated." Judicial formulations of the privilege have long expressed a similar view. In one of the earliest American opinions upholding the privilege, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts wrote:

> The principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal advisor and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts *the mouth of the attorney shall be for ever sealed*.

Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1834) (emphasis added).

Justice David Brewer put the matter similarly in an opinion written shortly before his appointment to this Court:

> [I]t is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that *that lawyer's tongue is tied from ever disclosing it* . . . .

United States v. Costen, 38 F. 24 (C.C.D. Colo. 1889) (emphasis added).

The view that the privilege does not lapse with time is reflected in the consistent line of federal and state caselaw, cited in the Petition for Certiorari, holding that the privilege survives the death of the client. As one author has summarized the rule:

> [T]he privilege, once it attaches, persists unless the lawyer is released by the client. Upon the death of the client, no release is possible. Hence death should seal the lawyer's lips forever.[3]

The same view has found expression in the proposed final draft of the American Law Institute's Restatement (Third) of the Law Governing Lawyers, which states that "[t]he privilege survives the death of the client";[4] in Dean

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[3] EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 234 (ABA Sec. of Litigation 3d ed. 1997); *accord* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:5, at 69 (Law. Coop. 1997) ("In all circumstances, other than the will contest exception, the privilege survives the death of the individual client . . . .").

[4] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, cmt. c, at 431 (Proposed Final Draft No. 1 1996); *see also id.* § 112, cmt. e, at 280 ("The duty of confidentiality continues so long as the lawyer possesses confidential client information. It extends beyond the end of the representation and beyond the death of the client.").

Wigmore's treatise, which says that "the privilege continues even after the *end of the litigation* or other occasion for legal advice and even after the *death of the client*";[5] in Judge Weinstein's treatise on evidence, which expresses "the general rule that the lawyer-client privilege survives the death of the client";[6] in Professors Hazard's and Hodes's treatise on *The Law of Lawyering*, which states that "since confidentiality (and the attorney-client privilege) are designed as inducements to speak at the time of the client-lawyer consultation, it is almost universally held that the lawyer's duty to maintain silence survives not only the relationship but also the death of the client";[7] and in this Court's proposed Federal Rule of Evidence 503, which would have provided for the survival of the privilege after the client's death.[8] The ABA's Ethics Committee summarized the rationale for the survival of the privilege in its Informal Opinion 1293:

> [T]here is no rule or reason to say that any such confidences and secrets should not be preserved indefinitely. Any other rule would mean that promptly upon the death of a client the privilege would be annulled and the attorney would be at liberty to disclose information which had been confided in him by the client while alive. This, to say the least, could lead to numerous serious problems involving the

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[5] 8 J. WIGMORE, EVIDENCE § 2323, at 631 (McNaughton rev. 1961).

[6] 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.32, at 503–96 (2d ed. 1997).

[7] 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.6:101, at 131 (1998).

[8] *See* PROPOSED FED. R. EVID. 503(c) ("The privilege may be claimed by . . . the personal representative of a deceased client . . . .").

client's representatives, surviving relatives and business associates. Such a concept would be in contravention of the very purpose of the privilege.[9]

C. The Lower Court's Flawed Reasoning

Although the D.C. Circuit's opinion does not purport to abrogate the privilege altogether upon the client's death, it fundamentally transforms the privilege by subjecting it to a court's balancing of the need for the information against the interests served by confidentiality. The D.C. Circuit's ruling is a departure from the ordinary rule that the attorney-client privilege, unlike privileges or protections that are qualified, "'cannot be overcome by a showing of need.'"[10] Indeed, this Court has noted that making the protection of a confidential communication dependent upon such a balancing test "would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996). The predictable effect of such a balancing analysis will be for a court to give preference to the needs of a party to the matter immediately at hand over the interests of an individual who is deceased and the more generalized policy interests of society in fostering attorney-client confidences.

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[9] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1293 (1974) (Maintenance of Confidences and Secrets of a Deceased Client).

[10] *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989) (quoting Saltzburg, *Corporate and Related Attorney-Client Privilege: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 299 (1984)); *see also Mason C. Day Excavating, Inc. v. Lumbermens Mut. Cas. Co.*, 143 F.R.D. 601, 609 (M.D.N.C. 1992) ("Unlike work product protection, under . . . federal common law . . . , the attorney-client privilege does not implicate a balancing test wherein the privilege may be disregarded solely because the opposing party can show a sufficient need for the information.").

The D.C. Circuit justifies this substantial weakening of the privilege by its conjecture that the prospect of revelation of attorney-client confidences in criminal matters after the client's death will have little effect on the willingness of clients to confide in attorneys. Common experience—and in particular the experience of members of the ABA—suggests that the D.C. Circuit's supposition is, at best, highly speculative. Every day, thousands of clients consult their attorneys with the object of ordering their affairs and providing for their families and loved ones in the event of their death—consultations that would not occur if clients were truly indifferent to what happened after they died.

While acknowledging that clients regularly show great concern for the effect of events after their death on the pecuniary well-being of their heirs, the D.C. Circuit nonetheless held that *criminal* matters will rarely implicate client interests that will survive death. The court reasoned that, by definition, the client cannot be held criminally liable after death; and it discounted the client's possible concern with the effect of a criminal matter on the client's reputation after death, stating that only a client with a near-Pharaonic interest in immortality would be concerned with such matters.

The court's reasoning is curious. We know that clients regularly show vital concern for their families' material well-being after their death. Why should we assume they would be less concerned about the possibility that their friends and loved ones might face criminal penalties?[11] Moreover, even if the odd notion that people care more about their survivors' financial interests than about whether they may be prosecuted

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[11] *Cf.* FED. R. EVID. 804(b)(3) (equating statements against pecuniary interest with statements against penal interest for purposes of applying hearsay rules).

and imprisoned were true, criminal matters often have extraordinarily grave financial consequences for their subjects (and their subjects' families). A client aware that an attorney-client confidence could be disclosed to a prosecutor or grand jury after the client's death could have great reason to fear that the result would be substantial fines and forfeitures that could ruin members of the client's family—even, possibly, family members innocent of any crime. *Cf. Bennis v. Michigan*, 516 U.S. 442 (1996).

As for the supposition that the concern of clients for their reputation after their death is so slight that the prospect of disclosure will not chill attorney-client communications, it, too, seems contrary to reason and experience. The maxim that "a good reputation is more valuable than money" has survived for centuries.[12] The consciousness that reputation lives on after death is evident not only in the works of memoirists and philanthropists, but in the efforts of ordinary men and women down to their last days to maintain the good regard of their friends and neighbors.[13] The depth of this concern is captured by Cassio's lament from *Othello*, act 2, scene 3:

> Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial.

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[12] PUBLIUS SYRUS, MAXIM 108 (42 B.C.).

[13] To cite only one example, President Grant—hardly a man of Pharaonic immodesty—spent the last months of his life in a successful race to complete his memoirs before he died of cancer, in order not only to secure his reputation for posterity, but also to provide the wherewithal for his family to extricate itself from the financial and legal difficulties into which he had brought it. E.B. Long, *Introduction* to ULYSSES S. GRANT, PERSONAL MEMOIRS OF U.S. GRANT, xx–xxii (1952) (Da Capo Press reprint 1982).

D. The Impact of the Decision

Regardless of whether the D.C. Circuit's reasoning is, in the end, found to be persuasive, this Court should address the issue. The D.C. Circuit's opinion, although binding precedent only in the federal courts of the District of Columbia, has a far larger practical impact. Given the scope of criminal investigations, clients anywhere in the country may have reason to fear that their confidences will someday become relevant to federal criminal proceedings before grand juries or courts in the District. Even though client confidences may be fully protected under the law of the state in which they were made, the D.C. Circuit's new federal rule would negate those protections in a federal criminal proceeding.[14] For exactly this reason, this Court has recognized the undesirability of federal privilege rules that have the effect of frustrating the purpose of state-law rules that foster socially valuable confidential communications. *Jaffee v. Redmond*, 116 S. Ct. at 1930.

Moreover, even a single opinion on such an issue from a prominent and respected federal appellate court creates a pressing need for a definitive resolution by this Court. Absent such a resolution, lawyers and clients are left to guess whether the D.C. Circuit's rule will be adopted by other federal courts (or whether some other federal court might apply its own balancing test to extend the principle to civil cases that the court may perceive to present issues sufficiently serious to outweigh the privilege of a dead client). In such a climate, prudent attorneys anywhere in the country will advise their clients—and particularly any clients whose death may seem imminent—that they should assume

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[14] *See* FED. R. EVID. 501 (providing that federal common law of privilege governs in federal courts except where state law provides the substantive rule of decision on a claim or defense in a civil action).

their communications will *not* remain confidential after they die. A cautious client may well respond by withholding information that is necessary to effective representation by the lawyer. Even without more widespread adoption, the D.C. Circuit's opinion thus may chill attorney-client communications and frustrate the very purposes of the privilege. For this reason, it is essential that this issue—unlike some others—not "percolate" further through the lower courts before being taken up by this Court. The uncertainty created by the decision is, from the standpoint of the privilege, as harmful as the rule announced by the court.

Nor is this an issue likely to affect only an insubstantial portion of the public. There are undoubtedly many thousands of people who live in the expectation of death and who want and would benefit from legal advice about matters that are personally embarrassing at the least and that might have even more serious consequences for surviving loved ones and friends. The D.C. Circuit's opinion makes clear that the assurance of confidentiality that can be given by lawyers to such clients is tenuous. Mindful that "[a]n uncertain privilege . . . is little better than no privilege at all," *Upjohn*, 449 U.S. at 393, this Court should put an end to the uncertainty created by the lower court on this important issue.

II.
THE COURT OF APPEALS' DENIAL OF OPINION WORK-PRODUCT STATUS TO ATTORNEY NOTES ALSO MERITS REVIEW BY THIS COURT

The D.C. Circuit's equally unprecedented denial of work-product protection to an attorney's notes of an initial client interview also merits review by this Court. Such notes, reflecting the attorney's own mental impressions, have long been at the heart of this Court's definition of "opinion work product." *See Upjohn*, 449 U.S. at 399. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329

U.S. 495 (1947), forcing an attorney to reveal such notes, reflecting "his language, permeated with his inferences" would be "demoralizing to the Bar" in the extreme. *Id.* at 516–17.

The D.C. Circuit majority's view that notes of an initial client interview, unlike notes of other witness interviews, reflect few of the attorney's own thoughts and opinions does not accord with the experience of practicing lawyers. The court's conception of the lawyer in an initial interview as a mere passive recipient of information misses the mark. Experienced practitioners recognize the initial interview as a critical stage in the representation of the client, in the course of which a skillful lawyer plays an important role in eliciting pertinent information and beginning to give shape to the goals and strategies to be pursued in the matter:

> One of the most important stages in legal representation is the initial client interview. The interview should be approached with the purpose of obtaining an exhaustive account of the client's predicament and outlining available solutions. Although proceeding to trial is not always the solution eventually chosen, experienced lawyers recognize the initial interview as crucial to the preparation for trial.[15]

Lawyers in the initial interview begin to "assess[] the truth and accuracy of a client's story based upon her comments, manner, delivery and gestures,"[16] guide the discussion toward facts and issues they perceive to be relevant, and discuss possible alternative courses of action to

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[15] FRED LANE, LANE GOLDSTEIN TRIAL TECHNIQUE § 1.03, at 3 (3d ed. 1997).

[16] *Id.* §1.07, at 5.

be pursued. A good lawyer's conduct of such an interview reflects recognition that "[t]he initial interview can set the tone for the entire case,"[17] and that the objective is "to identify the client's hidden agenda" so that the lawyer may "address the most critical matters immediately and design [the lawyer's] overall approach around the client's particular needs."[18] The lawyer's notes taken in this process necessarily reflect not only the way he or she has helped shape the interview, but also the lawyer's professional judgment about the relative importance of the various subjects discussed in the interview.

The D.C. Circuit's denial of opinion work-product status to the notes in this case thus represents a significant breach in the protection afforded to lawyers' thoughts and mental impressions formed in anticipation of litigation. Again, Justice Jackson's words aptly capture the potential impact of such a rule:

> The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which

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[17] NOELLE C. NELSON, CONNECTING WITH YOUR CLIENT 1 (ABA Sec. of Law Practice Management 1996).

[18] STANLEY S. CLAWAR, YOU & YOUR CLIENTS: A GUIDE TO CLIENT MANAGEMENT SKILLS FOR A MORE SUCCESSFUL PRACTICE 3 (ABA Gen. Practice Sec. 2d ed. 1996).

> would feel the consequences of such a practice . . . secondarily but certainly.

Hickman v. Taylor, 329 U.S. at 514–15 (Jackson, J., concurring).

CONCLUSION

The issues decided in the court below are of grave concern to the legal profession. As one observer has written:

> Lawyers fret that the protections of the attorney-client privilege and the work-product immunity are being eroded. The fear is hardly surprising. Of all the evidentiary and discovery rules, these two go to the heart of both the lawyer's relationship with a client and the lawyer's jealously guarded right to develop litigation strategies without fear of compelled disclosure to an adversary.[19]

The decision of the D.C. Circuit in this case significantly erodes the scope of the attorney-client privilege and work-product protections as applied in the federal courts, with significant practical consequences for attorneys and their clients nationwide.

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[19] EPSTEIN, *supra*, at 450.

For these reasons, as well as those set forth in the Petition, this Court should grant the Petition for Writ of Certiorari to address the important issues it presents.

Respectfully submitted,

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No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
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v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 31, 1997
CERTIORARI GRANTED MARCH 30, 1998

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NOTICE

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to the Petition for a Writ of Certiorari:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sealed Case, Nos. 95-446 and 95-447

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
December 4, 1995	Grand Jury Subpoenas to James Hamilton and Swidler & Berlin
December 18, 1995	Motions to Quash or Modify Grand Jury Subpoenas; Memorandum in Support of Motions; Affidavit of Sheila Anthony; Affidavit of James Hamilton
December 26, 1995	Motion of Independent Counsel to Compel Production of Documents and a Privilege Log; Memorandum in Support of Motion
February 5, 1996	Memorandum in Opposition to Independent Counsel's Motion to Compel a Privilege Log and Production of Documents
February 12, 1996	Independent Counsel's Reply to Opposition to Motion to Compel Production of Documents and Privilege Log
February 20, 1996	Sur-Reply to Independent Counsel's Reply to Opposition to Motion to Compel Production of Documents and Privilege Log
June 21, 1996	Order: that by July 1, 1996 all documents responsive to subpoena, except those which are privileged, shall be produced to Independent Counsel; and all documents for which privilege is asserted shall be submitted to the Court for *in camera* review

Date	Proceedings
July 9, 1996	Privilege Log
July 12, 1996	Amended Privilege Log
July 16, 1996	Independent Counsel Memorandum in Support of Opposition to Motions to Quash or Modify Grand Jury Subpoenas
July 26, 1996	Reply Memorandum in Support of Motions to Quash or Modify Grand Jury Subpoenas; Third Affidavit of James Hamilton
December 16, 1996	Memorandum Order: motions to quash or modify grand jury subpoenas denied in part and granted in part; motions to modify granted and Swidler & Berlin and James Hamilton not required to produce documents described in privilege log
January 15, 1997	United States' Notice of Appeal

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re Sealed Case, Nos. 97-3006 and 97-3007

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
January 27, 1997	Case docketed; Order consolidating cases and setting briefing schedule
March 28, 1997	Brief of Appellant United States; Appellant's Appendix
April 28, 1997	Brief of Appellees Swidler & Berlin and James Hamilton
May 12, 1997	Reply Brief of Appellant United States
June 13, 1997	Letter filed by Appellant advising of additional authorities re attorney-client privilege
June 19, 1997	Letter filed by Appellee submitting James Hamilton's notes of July 11, 1993 for *in camera* Review
June 20, 1997	Oral Argument held before Judges Wald, Williams and Tatel
August 29, 1997	Judgement and Opinion reversing and remanding case to United States District Court; Dissenting Opinion of Judge Tatel
October 8, 1997	Appellees' Petition for Rehearing With Suggestion for Rehearing En Banc
October 27, 1997	Appellant's Response to Petition for Rehearing and Suggestion for Rehearing En Banc

Date	Proceedings
November 21, 1997	Order Denying Petition for Rehearing; Order Denying Suggestion for Rehearing En Banc; Dissenting Opinion of Judges Tatel and Ginsburg
January 12, 1998	Order unsealing certain record documents, provided certain redactions are made
April 23, 1998	Order granting Appellant's motion to unseal a portion of the record and granting Appellees' alternative request contained in response to Appellant's motion

Excerpt from Affidavit of James Hamilton executed December 18, 1995 in Sealed Case, U.S. District Court for the District of Columbia, Nos. 95-446 and 95-447.

[The portion of the affidavit printed below has been unsealed in accordance with the Order of the United States Court of Appeals for the District of Columbia Circuit issued April 23, 1998 in *In re Sealed Case*, No. 97-3006. The remainder of the affidavit remains under seal.]

34. On July 11, 1993, Mr. Foster conferred with me regarding the possibility of my being retained by the White House, or perhaps him if I did not represent the White House, in connection with certain matters that had occurred at the White House. He made clear at the outset that this was a "privileged" conversation. From the very beginning of the conversation I understood that I was being considered for retention regarding the investigations Mr. Foster anticipated and any ensuing litigation, which also was probable. In fact, litigation regarding the matter we discussed has occurred. I have notes on this conversation, which contain information provided by Mr. Foster, as well as my mental impressions, observations, conclusions, and plans for action. These notes are my work product and are properly characterized as core work product.

Excerpt from Affidavit of James Hamilton executed July 25, 1996 in Sealed Case, U.S. District Court for the District of Columbia, Nos. 95-446 and 95-447.

[The portion of the affidavit printed below has been unsealed in accordance with the Order of the United States Court of Appeals for the District of Columbia Circuit issued April 23, 1998 in *In re Sealed Case*, No. 97-3006. The remainder of the affidavit remains under seal.]

7. During my privileged meeting with Mr. Foster on July 11, 1993, I discussed with him his need for personal representation as well as my possible representation of the White House.

(8)

No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN and JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

CORRECTED COPY

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49 pp

QUESTIONS PRESENTED

1. Whether, when a client dies, the attorney-client privilege in a criminal proceeding is no longer absolute, but is subject to a balancing test that requires the attorney to produce evidence of privileged communications with the client if they "bear on a significant aspect" of the case "as to which there is a scarcity of reliable evidence."

2. Whether, as a matter of law, an attorney's handwritten notes taken during an initial interview with a client do not receive the virtually absolute work product protection otherwise afforded to an attorney's "mental impressions," because at this stage the lawyer "has not sharply focused or weeded the materials" and exercised professional judgment as to what to record.

PARTIES TO THE PROCEEDING

The petitioners are Swidler & Berlin and James Hamilton. The parties to the proceeding in the Court of Appeals were Swidler & Berlin, James Hamilton and the United States of America.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority opinion of the court of appeals and a redacted version of the dissenting opinion are reported at 124 F.3d 230 and are printed in full text at Pet. App. 1a-26a.[1] The court's order on petition for rehearing, and the opinion dissenting from denial of rehearing (Pet. App. 27a-32a), are reported at 129 F.3d at 637. The district court issued a separate opinion for each of the two subpoenas involved. The opinions, which are iden-

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[1] After the opinions were published, the court of appeals entered an order unsealing, among other things, the redacted portions of Judge Tatel's dissent. Order dated January 12, 1998, D.C. Cir. No. 97-3006. Consequently, the appendix to the petition for certiorari (hereinafter Pet. App.), which was filed after the unsealing order, contains an unredacted version of Judge Tatel's dissent.

tical except for docket numbers and captions, are not reported and are printed (with redactions not relevant here) at Pet. App. 32a-42a and 43a-53a.

JURISDICTION

The court of appeals entered its judgment on August 29, 1997. The court entered an order denying a timely petition for rehearing on November 21, 1997. The petition for certiorari was filed December 31, 1997. The petition was granted March 30, 1998. On April 6, 1998 the Court expedited consideration of this case. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 501 of the Federal Rules of Evidence and Rule 26(b)(3) of the Federal Rules of Civil Procedure appear at Pet. App. 54a-56a.

STATEMENT

On July 11, 1993, in the midst of intense public controversy about the White House Travel Office, White House Deputy Counsel Vincent Foster met with Washington, D.C., attorney James Hamilton to discuss his and the White House's possible needs for legal representation. In anticipation of the meeting, Mr. Hamilton read and made notes on a report issued by the White House on the Travel Office matter. Pet. App. 40a. He and Mr. Foster then spoke for two hours, during which Mr. Hamilton took three pages of handwritten notes. Pet. App. 31a. Before the conversation began, Mr. Foster sought and received assurances from Mr. Hamilton that the conversation was privileged. Pet. App. 25a. This is confirmed by Mr. Hamilton's December 18, 1995 Affidavit, which recounted that Mr. Foster "made clear at the outset that this was a 'privileged' conversation." JA 5. Indeed, one of the first entries in the notes is the word "Privileged," reflecting this exchange between them. Pet. App. 41a.

Mr. Hamilton's Affidavit also states that, in addition to including information provided by Mr. Foster that Mr. Hamilton saw fit to record, the notes contain his "mental impressions, observations, conclusions, and plans for action." JA 5. And as Judge Tatel said, "[t]he notes bear the marking of a lawyer focusing the words of his client; he underlined certain words, placing both check marks and question marks next to certain sections." Pet. App. 31a.

Nine days after the meeting, Mr. Foster committed suicide in Fort Marcy Park in Virginia. Over two years later, on December 4, 1995, a federal grand jury, at the request of Independent Counsel, issued subpoenas to Mr. Hamilton and his law firm, Swidler & Berlin, seeking Mr. Hamilton's notes.

Mr. Hamilton and his firm moved to quash or modify the subpoenas. The district court (Chief Judge Penn) inspected the notes *in camera*. He found that "Hamilton met with Foster to discuss possible representation of Foster," "that Foster spoke with Hamilton as an attorney and [that] a review of the notes supports that finding." Pet App. 41a. He held that "one of the first notations on the [notes] is the word: 'Privileged,' so it is obvious that the parties, Hamilton and Foster, viewed this as a privileged conversation." Pet. App. 41a. He also found that the notes were prepared in anticipation of litigation and "reflect the mental impressions of the lawyer." Pet. App. 42a. The district court concluded that both the attorney-client and work product privileges barred disclosure. Pet. App. 41a, 42a.

The Court of Appeals for the District of Columbia reversed. Recognizing that "[t]he parties agree that the communications at issue would be covered by the [attorney-client] privilege if the client were still alive," the court concluded that "the client's death calls for a qualification of the privilege." Pet. App. 2a. The "qualification" created by the court would permit "post-death

use [of the otherwise privileged communication] in criminal proceedings" where the prosecutor convinces the trial court that the "relative importance [of the communication] is substantial." Pet. App. 10a. The court declared that the prosecutor is entitled to obtain privileged communications that "bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence." Pet. App. 10a. On the other hand, "[w]here there is an abundance of disinterested witnesses with unimpaired opportunities to perceive and unimpaired memory, there would normally be little basis for intrusion on the intended confidentiality." *Id.* Independent Counsel in his briefs had not argued for such a balancing process.

The court of appeals reasoned that the prospect of post-death revelation in the criminal context will trouble a client less than in the civil context, because after death "criminal liability will have ceased altogether" while civil liability "characteristically continues." Pet. App. 6a. The court recognized that a concern for survivors might stir a desire to protect the client's estate from civil liability, but did not discuss whether the same concern might foster an interest in protecting the living from criminal penalties. Pet. App. 6a. The court also "doubt[ed]" that the client's concerns for post-death reputation would be "very powerful; and against them the individual may even view history's claims to truth as more deserving." Pet. App. 7a. The court added that, "[t]o the extent . . . that any post-death restriction of the privilege can be confined to the realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil." Pet. App. 7a.

As to the other side of the balance, the court concluded that the client's death heightens the prosecutor's need for otherwise privileged communications. The court concluded that "unavailability through death, coupled with

the non-existence of any client concern for criminal liability after death, creates a discrete realm (use in criminal proceedings after death of the client)" where the privilege should give way upon the prosecutor's showing of need. Pet. App. 7a-8a.

The court of appeals also held that the notes were not protected by the work product privilege. The court recognized prior decisions holding that attorney interviews conducted "as part of a litigation-related investigation" receive heightened work product protection even as to factual material, because "the facts elicited necessarily reflected a focus chosen by the lawyer." Pet. App. 13a. However, the court concluded that the present case is different because

> the interview was a preliminary one initiated by the client. Although the lawyer was surely no mere potted palm, one would expect him to have tried to encourage a fairly wide-ranging discourse from the client, so as to be sure that any nascent focus on the lawyer's part did not inhibit the client's disclosures.

Id. Because of the court's conclusive presumption that, at this stage, the lawyer "has not sharply focused or weeded the materials," it found that the notes did not deserve the "super-protective envelope" normally afforded opinion work product. Pet. App. 13a-14a. The Court remanded the case to the district court for reexamination of the notes in light of its opinion as to both the attorney-client and work product issues.

Judge Tatel dissented. While conceding that concern for surviving friends and family or posthumous reputation "may not influence *every* decision to confide potentially damaging information to attorneys," Judge Tatel concluded that "these concerns very well may affect *some* decisions, particularly by the aged, the seriously ill, the suicidal, or those with heightened interests in their posthumous reputations." Pet. App. 23a (emphasis in orig-

inal). Judge Tatel argued that, after the court's decision, such persons will not talk candidly with a lawyer after they receive the advice the court's opinion now requires lawyers to give:

> I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

Pet. App. 20a (emphasis in original). Judge Tatel concluded that the court's decision "strikes a fundamental blow to the attorney-client privilege and jeopardizes its benefits to the legal system and society." Pet. App. 26a.

The court of appeals denied rehearing *in banc*, with two judges dissenting as to the attorney-client privilege issue (Judges Tatel and Ginsburg).[2] Pet. App. 28a. The dissent emphasized that Independent Counsel had offered no evidence that abrogating the attorney-client privilege after death will not chill client communications with attorneys. Pet. App. 29a-30a. Such evidence, the dissent argued, is required to overturn the common law rule that the privilege survives death—a rule resting on the proposition that it is necessary to promote candid client disclosures.

Judge Tatel also dissented on the work product issue. He disgreed with the court's conclusive presumption that attorney notes taken at an initial client interview do not reflect the attorney's mental impressions because the lawyer does not "sharply focus[] or weed[]" the words of a client at an initial session. Pet. App. 30a. Instead, Judge Tatel argued, "lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients." *Id.*

[2] Judges Sentelle and Garland did not participate.

> Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the "opinions, judgment, and thought processes of counsel."

Pet. App. 31a (citation omitted). In this case, Judge Tatel said, the notes demonstrate that Mr. Hamilton "actively exercised his judgment when interviewing his client," because "[i]n two hours, he created only three pages of notes," in which he "underlined certain words, placing both check marks and question marks next to certain sections." Pet. App. 31a. Consequently, Judge Tatel concluded, "[t]he notes clearly represent the opinions, judgment, and thought processes of counsel," the same conclusion the district court had reached. *Id.*

SUMMARY OF ARGUMENT

1. Persons who expect to die soon—whether because of advanced age, illness, suicide, or a dangerous life-style—have the right to consult attorneys in confidence about criminal matters that threaten friends, associates, family or their own reputations. The court of appeals' decision denies them that right, and thus discriminates against the dying. More broadly, the decision also defeats the fundamental purpose of the privilege, which is to encourage full and frank communication between attorneys and clients and thereby promote observance of law and the administration of justice. In so doing, it potentially will affect adversely, on a daily basis, innumerable conversations between clients and their attorneys, as amici attorney associations confirm.

The court of appeals erroneously assumes that persons facing death do not care whether their friends, associates, family, or their own reputations are harmed by disclosures

after death in criminal proceedings. This assumption ignores the fact that people write wills, establish trusts, buy life insurance and burial plots, establish foundations, endow chairs, and write memoirs—actions evincing concern for what happens to the well-being of others and their own reputations following death.

The adverse effect of the court of appeals' decision on client candor is not ameliorated by limiting disclosure to criminal proceedings, and by requiring the prosecution to demonstrate that it needs the evidence. An elderly or ill person may be far more troubled by the prospect of a loved one's suffering a criminal sanction, than by potential civil liabilities that might diminish the family's inheritance. And a case in which the prosecution needs the evidence is exactly the kind of case where the prospect of disclosure would most trouble the client.

Moreover, the court of appeals' balancing test results in substantial uncertainty and "[a]n uncertain privilege is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Making the promise of confidentiality contingent upon the outcome of an uncertain balancing test "would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996).

Rule 501 of the Federal Rules of Evidence requires federal courts to consider "reason and experience" in interpreting the common-law privileges. The great weight of case law holding that the privilege survives death (except in the testamentary context), as well as the numerous state statutes to the same effect, reflect both "reason" and "experience," which instruct that client candor will be chilled if clients know that the privilege may evaporate after their death.

There is no merit to the court of appeals' argument that the privilege already is so beset with exceptions that one more will do little damage. In particular, the testamentary exception, which was in large part designed to effectuate the client's intent, should not be relied on to frustrate that intent by permitting testimony that may inflict criminal sanctions on the client's friends, family or associates. Despite the extant exceptions, the attorney-client privilege still is vital to our system of justice. The argument that one more exception can do little harm can lead only to progressive erosion of the privilege.

2. The court of appeals' decision refusing to accord heightened work product protection to the notes was fatally infected by its unsupportable presumption, which Independent Counsel does not defend, that lawyers at initial client interviews do not exercise professional judgment in determining what client statements to record and how to record them. This presumption is belied by the experience of seasoned practicing attorneys, whose views are represented by amici attorney associations, and by the record in this case. Clients typically choose attorneys because of their professional background and experience. Mr. Hamilton brought to the Foster interview extensive experience in highly-publicized, "political" cases. He also had prepared for the interview by reading a recently-issued White House report on the Travel Office matter. During the course of a two-hour interview, he took only three pages of notes, clearly exercising judgment as to what to record. His actions vividly illustrate the unrealistic nature of a presumption that lawyers at initial interviews are simply passive recorders of what clients say.

This Court's leading decisions on the work product privilege have accorded "special protection" to attorney notes of witness interviews, because " 'what [the attorney] saw fit to write down regarding witnesses' remarks' " reflects the attorney's mental impressions, which the privilege is designed to protect. *Upjohn Co. v. United States, supra*, 449 U.S. at 399-400, quoting *Hickman v. Taylor*, 329 U.S. 495, 513 (1947). Redaction does not resolve the issue; it may serve to eliminate the attorney's explicit ex-

pressions of opinion, but disclosure of the "factual" portions of the notes inevitably reveals the attorney's selection of what was "fit to write down."

The court of appeals' erroneous presumption that attorneys do not bring their professional judgment to bear in initial client interviews led it to conclude that the ordinary standard of need under Federal Rule of Civil Procedure 26 should be applied in determining whether the privilege pertains, rather than the heightened standard required by *Hickman* and *Upjohn*. Allowing the prosecution to obtain attorney interview notes based on the ordinary standard of need will destroy the "privileged area within which [the attorney] can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). When taking interview notes, an attorney cannot possibly know how a court might view a prosecutor's later assertion of need, and if disclosure hinges on such assertion, both attorney and client would be at peril whenever the attorney takes notes. The inevitable result would be that "much of what is now put down in writing would remain unwritten"—degrading the quality of case preparation and, ultimately, the administration of justice. *Hickman v. Taylor, supra*, 329 U.S. at 511.

ARGUMENT

I. THE PRIVILEGE PROTECTING COMMUNICATIONS BETWEEN CLIENT AND ATTORNEY SURVIVES THE CLIENT'S DEATH.

As Judge Tatel found, and the views of thousands of seasoned lawyers represented by amici attorney associations confirm, the court of appeals' decision strikes a "fundamental blow" to the attorney-client privilege.[3] Indeed, the decision discriminates against the aged, the diseased, and the distraught—against the most vulnerable in our society—by denying them the right to consult a lawyer in

[3] It is also a direct attack on Mr. Foster's desire and intention that the conversation at issue remain privileged.

confidence.[4] Reason and experience, whose consideration Federal Rule of Evidence 501 demands, do not allow this badly flawed decision to stand.

1. The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege is "rooted in the imperative need for confidence and trust" between client and attorney, without which the client is not likely to reveal facts that may be deeply embarrassing or incriminating. *Trammel v. United States*, 445 U.S. 40, 51 (1980). The attorney must "know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* The privilege thus is "justified . . . by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (*quoting Trammel*, 445 U.S. at 50).

For practicing lawyers, the privilege is vital. "[T]he problem of the guarded half-truths of the reticent client is familiar to [lawyers] in their day-to-day work." 1 *McCormick on Evidence*, § 6 at 353 (4th ed. 1992). Ability to give an unqualified assurance of confidentiality is necessary for the lawyer seeking to persuade a nervous or reluctant client to tell the whole truth. But under the court of appeals' decision, the lawyer cannot give unqualified assurance. Instead, the lawyer must tell the client that "when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution." Pet. App. 20a. For a client who is elderly, severely ill, suicidal or has other reason to expect imminent death, such a statement would

[4] Amicus National Hospice Organization supports Petitioners because the decision discriminates against the dying.

sound more like a *Miranda* warning than an assurance of confidentiality.

This Court has recognized that "the privilege has the effect of withholding relevant information from the fact-finder." *Fisher v. United States*, 425 U.S. 391, 403 (1976). For that reason, the privilege applies only "where necessary to achieve its purpose." *Id.* But where the purpose of the privilege is implicated, it must be applied in order to "encourage clients to make full disclosure to their attorneys." *Id.* And where the privilege applies, it bars the grand jury from obtaining the privileged information. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

Moreover, the fact-finder's loss is more apparent that real. Because the privilege only protects communications "which might not have been made absent the privilege," *Fisher v. United States, supra*, 425 U.S. at 403, the fact-finder loses access only to a communication that may never have been made without an assurance of confidentiality. "Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Jaffee v. Redmond, supra*, 518 U.S. at 12. "This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." *Id.*

The facts of this case are vivid illustration of how the privilege creates information, rather than suppressing it. The district court found that "one of the first notations on the [notes] is the word: 'Privileged', so it is obvious that . . . Foster . . . viewed . . . notes of that conversation as privileged." Pet. App. 25a. Indeed, as this notation reflected and Mr. Hamilton's Affidavit confirms, Mr. Foster had asked Mr. Hamilton before the conversation began whether it was privileged and received assurances that it was. Pet. App. 41a. Thus the conversation likely would not have taken place—and there would have been no notes to subpoena—had Mr. Hamilton not given this assurance of confidentiality. JA 5, Pet. App. 25a. The con-

versation occurred just nine days before Mr. Foster took his own life, and apparently within hours of when he wrote his now famous note stating, in obvious reference to himself, that in Washington "ruining people is considered sport."[5] While we will never know his precise thoughts, it is likely that he would have been reluctant to confide had he been told that the conversation was privileged *unless you die*.

In arguing that the client's death creates a greater need for the information, the court of appeals asserts—contrary to the policy underlying the privilege as well as the case law applying it—that need for the information overcomes the privilege. That argument ignores the fact that the information might well not exist but for the privilege. As Judge Tatel observed, that argument also would justify abrogating the privilege whenever the witness is unavailable for any reason.[6] And it ignores the prevailing federal and state case law recognizing that, where the privilege applies, it is absolute and may not be overcome by a showing of the fact-finder's need. "[I]f a party demonstrates that the attorney-client privilege applies, the privilege affords all communications between attorney and client absolute and complete protection from disclosure." *In re Allen*, 106 F.3d 582, 600, *rehearing in banc denied*, 119 F.3d 1129 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 689 (1998). "Assuming the requisite relationship and confidential communication, the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar

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[5] Fiske, *Report of the Independent Counsel In Re Vincent W. Foster, Jr.*, pp. 13-14 and Exh. 5 (June 30, 1994).

[6] However, *Valdez v. Winans*, 738 F.2d 1087 (10th Cir. 1984), held in a habeas proceeding that an accused's constitutional rights were not violated when the state trial court sustained a claim of attorney-client privilege to bar testimony by an attorney that her client, rather than the defendant, committed the crime. In that case the client was not dead, but was unavailable to testify because he had invoked the Fifth Amendment.

to the case." *Gordon v. Superior Court,* 65 Cal. Rptr. 2d 53, 59 (Cal. Ct. App. 1997); *Westinghouse Elec. Corp. v. Republic of Philippines,* 951 F.2d 1414, 1429 (3d Cir. 1991) ("The work-product doctrine recognizes a qualified evidentiary protection, in contrast to the absolute protection afforded by the attorney-client privilege."); *Kujawa v. Manhattan Nat'l Life Ins. Co.,* 541 So.2d 1168, 1169 (Fla. 1989) (attorney-client privilege provides "absolute immunity from disclosure"); *National Sec. Fire & Cas. Co. v. Dunn,* 705 So.2d 605, 608 (Fla. Dist Ct. App. 1997) ("Notwithstanding a litigant's entitlement to work-product material upon a showing of need and undue hardship, the attorney-client privilege is absolute."); *Spectrum Systems Int'l Corp. v. Chemical Bank,* 581 N.E. 2d 1055, 1060 (N.Y. 1991) (attorney-client communications entitled to "absolute immunity" from discovery).

2. There is no basis for the court of appeals' conclusion that the purpose of affording absolute protection to attorney-client communications as to criminal matters evaporates when the client dies. The court of appeals explicitly and wrongly assumes that persons facing death do not care whether their own reputations are harmed by disclosures after death in criminal matters. The court implicitly and wrongly assumes that the dying do not care about the post-death impact of criminal proceedings on their family, friends and associates. These assumptions are contrary to the "reason and experience" that Rule 501 requires the federal courts to consider in interpreting the attorney-client privilege. People write wills, establish trusts, buy life insurance and burial plots, invest in their children's education, establish foundations, endow chairs and write memoirs—actions evincing concern for what happens to the well-being of others and their own reputations following death.

Concern for the well-being of others comports with the finest traditions of our culture and religious heritages. The Bible exhorts us to care for others and to "love your

neighbor as yourself."[7] Our national tradition celebrates those who devoted their lives to serving others. We observe, for example, national holidays on the birthdays of Presidents Washington and Lincoln and Dr. Martin Luther King. Most of us fall short of the standards set by our faiths and our national heroes, but many Americans give generously to charities and exhibit concern for others in their daily lives. And most of us also have family, friends and associates we would not want to harm—before or after our death. To argue that concern for others does not typically extend beyond death is to posit a callous self-centeredness that is inconsistent with common experience.

Nor is it correct to suggest, as does one academic commentator cited by the court of appeals, that ordinary people have no concern for their reputation following death and to disparage any such concern as "Pharaoh-like." Pet. App. 4a, quoting 24 Wright & Graham, *Federal Practice and Procedure* § 5498, at 484 (1986). This far too dismissive comment overlooks the fact that many persons adhering to more contemporary faiths place great store in the value of a good name. Concern for one's own reputation is a value celebrated by the Bible[8] and our culture's great literary works;[9] it is hardly an outdated relic of ancient times. And plainly, "peoples' concern with reputation may well be socially desirable and hence worth encouraging. For if individuals did not care about their name, including after their death, they would likely behave worse—morally and legally—while alive." Frankel, *The Attorney-Client Privilege After the Death of the Client,* 6 Geo. J. Legal Ethics 45, 63 (1992).

Thoughts about how one will be remembered by his family, friends and community, are quite likely to emerge

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[7] *Leviticus* 19:18; *Mark* 12:31.

[8] "A good name is rather to be chosen than great riches." *Proverbs* 22:1.

[9] "The purest treasure mortal times afford [i]s spotless reputation." Shakespeare, *Richard II,* Act I Scene 1.

shortly before death. Such thoughts could well make a client fearing posthumous disclosure chary about revealing sensitive, personal matters to an attorney.

As Judge Tatel remarked in dissent, this case is a particularly inappropriate one in which to abrogate the posthumous protection of the privilege. Mr. Foster, shortly before his death, gave a law school commencement speech emphasizing the high value he placed on personal reputation. Pet. App. 23a. Indeed, Independent Counsel Starr's report on Mr. Foster's death stressed that his "public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance." Starr, *Report of the Office of Independent Counsel on the Death of Vincent W. Foster, Jr.*, at 98 (1997). Independent Counsel Fiske and even Independent Counsel Starr (who now generally minimizes the concern for posthumous reputation) both concluded that attacks on Mr. Foster's reputation and others could have contributed to the depression that caused him to take his own life. *Id.* at pp. 105-10; Fiske, *Report of the Independent Counsel In Re Vincent W. Foster, Jr.*, pp. 8-17 (1994).[10]

The court of appeals expressed "doubt" that an individual's "residual" interest in post-mortem reputation "will be very powerful," suggesting that "the individual may even view history's claims to truth as more deserving." Pet. App. 7a. But anyone familiar with memoirs knows that most people who speak "for history" tend to choose words with extreme care. "Most public servants' memoirs turn out to be self-serving exercises in which their political decisions are retrospectively interpreted in the best possible

[10] Mr. Fiske also relates how Mr. Foster, upset that a colleague was reprimanded in the Travel Office matter, sought instead to take the blame himself. *Id.* at p. 12. Mr. Foster's now famous note—likely written within hours of his visit to Mr. Hamilton—says, in obvious reference to himself, that in Washington "ruining people is considered sport." *Id.* at pp. 13-14 and Exh. 5. The note also complains that "the public will never believe the innocence of the Clintons and their loyal staff." *Id.* at Exh. 5. His concern for both his reputation and the well-being of others is evident.

light." [11] A respected recent memoirist described how he went through his final draft "with a fine tooth comb" to assure that, while being honest, he would "not, at the same time, be hurtful," because he knew "everything you say will be in print forever." [12] The attorney-client privilege is designed to ensure that persons speak with counsel with candor and do not edit their statements with a "fine tooth comb."

There are many public people who feel, with considerable justification, that there is some information as to which the claims of privacy outweigh the claims of history. Justice Black, on the eve of his death, directed that certain of his Court papers be destroyed, in order to preserve the confidentiality of the Court's deliberations.[13] Some years ago, there was strong criticism of a psychotherapist who released tapes of his sessions with the poet Anne Sexton, 17 years after her suicide, to the writer of a biography published 10 years later.[14] Whether these con-

[11] "We Can All Learn from McNamara's Memoirs," New York Times (Apr. 13, 1995) at p. A24.

[12] "Colin Powell Talks About His Family, 'the Producers' and the Making of a Memoir," Chicago Tribune (Aug. 26, 1996) at p. C3. If we may be so bold, we also submit that judges carefully write opinions with a view to the opinion of posterity.

[13] Newman, *Hugo Black* 621-622 (1994). Only his conference notes were destroyed. Justice Black explained to his son that "reports by one Justice of another's conduct in the heat of a difference might unfairly and inaccurately reflect history." Wigdor, *The Personal Papers of Supreme Court Justices* 48 (1986).

[14] The therapist who released the tapes was "excoriated" by the president of the American Academy of Psychoanalysis and the chairman of the ethics committee of the American Psychiatric Association. "Dead Poet's Confidences an Open Book," Cleveland Plain Dealer (Sept. 22, 1991), 1991 WL 4521561. Another commentator on the incident, a writer and psychiatrist, stated that "[m]ost authors I know are very invested in what reputation might outlive them." Ablow, "Whose Life Is It, Anyway?; Keeping Confidences Shared in Psychotherapy," Washington Post (Sept. 24, 1991), 1991 WL 2117233. Although the tapes were released with the consent

cerns are right or wrong is not paramount. What is important is that many people feel strongly that there is a zone of privacy that should be respected even after death. Such feelings would inhibit candor where a person who is elderly, ill or suicidal is told that the privacy of conversations with an attorney may not be respected following death.

The court of appeals cited academic commentators who stated that few clients are much concerned about what will happen after "the death that everyone expects but few anticipate in an immediate or definite sense." Pet. App. 5a, quoting 2 Mueller & Kirkpatrick, *Federal Evidence* § 19, at 380 (1994). But the attorney-client privilege does not exist only for the benefit of young, healthy clients, for whom death may be a remote prospect. While it may be that those who are blessed with the insouciance of youth have no concerns about their passing, those of us burdened by the exigencies of advancing age, infirmity and distress also are entitled to obtain confidential legal advice. Every year, hundreds of thousands of Americans learn that they have a life-threatening illness.[15] Every year, millions of Americans, even those fortunate enough to retain good health, reach an age at which thoughts of mortality intrude. These people—as well as others who are

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of the potet's daughter and literary executor, this commentator compared the therapist who released them to "a priest who, at the family's request, makes available the confessions of a deceased parishioner." *Id. See also*, "Release of Poet's Therapy Tapes Called a Breach of Confidentiality Ethics: Psychiatrist criticized for giving Anne Sexton's biographer access to the recordings, even 17 years after Pulitzer Prize winner's suicide," Los Angeles Times (Aug. 11, 1991), 1991 WL 2245191.

[15] In 1993, some 566,000 persons died of cancer or as a consequence of HIV infection. U.S. Department of Commerce, *Statistical Abstract of the United States 1996*, at 96. Given the nature of these diseases, most of these persons likely were aware for some period of time that they would die soon. The American Cancer Society estimates that there were 1.3 million new cancer cases in 1996. *Id.* at 145.

suicidal or engaged in hazardous lifestyles—are entitled to consult an attorney in confidence. Indeed, people in the final stages of life frequently feel a particular need to speak with an attorney to put their own affairs in order or to resolve family or business problems. But under the court of appeals' decision, those people may lose their right to do so in confidence.

3. The overwhelming majority of decided cases supports the conclusion that the attorney-client privilege survives the client's death. Seven states have held that the attorney-client privilege survives the death of the client in criminal proceedings.[16] The Ninth Circuit and 19 states have held that the attorney-client privilege survives the client's death in civil cases.[17] The only decision to the

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[16] The following decisions excluded from criminal proceedings evidence of communications between a deceased person and that person's attorney: *Mayberry v. Indiana*, 670 N.E.2d 1262 (Ind. 1996); *In re a John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990); *People v. Modzelewski*, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994); *Arizona v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976), *cert. denied*, 439 U.S. 1006 (1978); *People v. Pena*, 198 Cal. Rptr. 819, 829 (Cal. Ct. App. 1984); *Cooper v. Oklahoma*, 661 P.2d 905, 907 (Okla. Crim. App. 1983); *South Carolina v. Doster*, 284 S.E.2d 218, 220 (S.C.), *cert. denied*, 454 U.S. 1030 (1981).

[17] The Ninth Circuit cases are *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977) and *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812, 815 (9th Cir. 1942). In *Osborn*, the disclosure had criminal implications; the district court had allowed intervenors to claim the Fifth Amendment privilege as to some documents at issue. 561 F.2d at 1336.

State cases holding that the privilege survives in civil proceedings are: *Fox v. Spears*, 93 S.W. 560 (Ark. 1906); *Doyle v. Reeves*, 152 A. 882 (Conn. 1931); *De Loach v. Myers*, 109 S.E.2d 777 (Ga. 1959); *Hitt v. Stephens*, 675 N.E.2d 275 (Ill. App. Ct.), *appeal denied*, 679 N.E.2d 380 (Ill. 1997)); *Estate of Voelker*, 396 N.E.2d 398 (Ind. Ct. App. 1979); *Bailey v. Chicago, Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 564 (Iowa 1970); *Stegman v. Miller*, 515 S.W.2d 244, 246 (Ky. 1974); *Morris v. Cain*, 1 So. 797, 807-8 (La. 1887); *Tillinghast v. Lamp*, 176 A. 629, 632 (Md. 1935); *Rich v.*

contrary is from a mid-level state appellate court that until two months ago had never been followed.[18] *None of these cases recognizes a distinction between the civil and criminal contexts.* This Court has stressed the importance of uniformity between federal and state court decisions, because a state promise of confidentiality would have little value if the client is aware that disclosure may be ordered by a federal court. *Jaffee v. Redmond, supra,* 518 U.S. at 13.

State courts, making no disinction between civil and criminal matters, also have held that other similar privileges survive death: the privilege for marital communications,[19] the patient-physician and patient-psychotherapist

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Fuller, 666 A.2d 71, 74-75 (Me. 1995); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264 (Mo. Ct. App. 1976); *Lorimer v. Lorimer*, 83 N.W. 609 (Mich. 1900); *Lennox v. Anderson*, 1 N.W.2d 912 (Neb.), *modified on other grounds*, 3 N.W.2d 645 (Neb. 1942); *Clark v. Second Judicial District Court*, 692 P.2d 512 (Nev. 1985); *Scott v. Grinnell*, 161 A.2d 179, 183 (N.H. 1960); *Anderson v. Searles*, 107 A. 429, 430 (N.J. 1919); *Taylor v. Sheldon*, 173 N.E.2d 892, 895 (Ohio 1961); *Miller v. Pierce*, 361 S.W.2d 623, 625 (Tex. Civ. App. 1962); *In re Smith's Estate*, 57 N.W.2d 727 (Wis. 1953).

Dicta in federal court opinions are to the same effect. *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 144 F.R.D. 600, 604 (D. Mass. 1992); *Dixson v. Quarles*, 627 F. Supp. 50, 53 (E.D. Mich.), *aff'd mem.*, 781 F.2d 534 (6th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986).

[18] *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976). After the court of appeals' decision in the present case, the Pennsylvania court followed that decision and its own *Cohen* decision in holding that the psychiatrist-patient privilege becomes a qualified privilege after the client's death where "criminal proceedings are conducted in the context of a grand jury investigation to solve the client's murder." *In re Subpoena No. 22*, Mich. No. 80099 of 1996, 1998 WL 86687, at *7 (Pa. Super. Ct. Mar. 2, 1998).

[19] *Curran v. Pasek*, 886 P.2d 272 (Wyo. 1994); *Merrill v. William Ward Ins. Co.*, 622 N.E.2d 743 (Ohio Ct. App. 1993); *Georgia Int'l Life Ins. Co. v. Boney*, 228 S.E.2d 731 (Ga. Ct. App. 1976).

privileges,[20] and the priest-penitent privilege.[21] These privileges survive death even though it is doubtful that, in most cases, the privileged communications would be chilled by fear of disclosure because the persons making them "have the worry of litigation in the back of their minds." *Jaffee v. Redmond, supra,* 518 U.S. at 24 (Scalia, J., dissenting). By contrast, persons consulting attorneys frequently are concerned about possible litigation (as Mr. Foster was), and it is thus fair to presume that the specter of posthumous disclosure in criminal litigation involving friends, family or associates would deter candor.

State case law holding that the attorney-client privilege survives death is supported by numerous state evidence codes providing that the privilege may be claimed after death by the client's personal representative.[22] These statutes reflect the position taken by the Model Code of Evi-

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[20] *Prink v. Rockefeller Ctr., Inc.*, 398 N.E.2d 517, 520 (N.Y. 1979); *Leritz v. Koehr*, 844 S.W.2d 583 (Mo. Ct. App. 1993); *Williams v. Kentucky*, 928 S.W.2d 942 (Ky. Ct. App. 1992); *Rittenhouse v. Superior Court*, 1 Cal. Rptr. 2d 595 (Cal. Ct. App. 1991); *Sims v. Georgia*, 311 S.E.2d 161 (Ga. 1984); *Jewell v. Holzer Hosp. Found. Inc.*, 899 F.2d 1507, 1513-14 (6th Cir. 1990) (applying Ohio law). *See* 1 *McCormick on Evidence* § 103 at 388 (4th ed.). *Contra*: *In re Subpoena No. 22, supra*, 1998 WL 86687.

[21] *Ryan v. Ryan*, 642 N.E.2d 1028, 1034 (Mass. 1994).

[22] "In general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client (either an executor or administrator)." *Restatement (Third) of the Law Governing Lawyers*, § 127, Comment c (Proposed Final Draft No. 1, March 29, 1996). *See also* the discussion of state statutes by Judge Tatel in his dissent. Pet. App. 17a-18a. State evidence codes allowing the personal representative of the deceased to assert the privilege include: Ala. R. Evid., Rule 502; Alaska R. Evid. 503; Ark. Code Ann. § 16-41-101, Rule 502; Cal. Evid. Code § 953; Del. R. Evid. 502; Fla. Stat. Ann. § 90.502; Haw. Rev. Stat. § 626-1, Rule 503; Idaho R. Evid. 502; Kan. Stat. Ann. § 60-426; Ky. R. Evid. 503; La. Code Evid. Ann. art. 506; Me. R. Evid. 502; Miss. R. Evid. 502; Neb. Rev. Stat. § 27-503; Nev. Rev. Stat. § 49.105; N.H. R. Evid. 502; N.J. Stat. Ann. 2A:84A, App. A,

dence, Rule 209(c)(1), and the Uniform Rules of Evidence, Rule 502(c).[23] Obviously, these statutes rest on the assumption that the privilege survives death. Rule 501 of the Federal Rules of Evidence provides that "reason and experience" shall govern the interpretation of a privilege and "it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'" *Jaffee v. Redmond*, *supra*, 518 U.S. at 13.[24]

The court of appeals argues that, because state evidence codes are consistent with the notion that the privilege expires when the estate is closed, they involve only testamentary matters and thus do not indicate that the privilege survives death in a criminal context. Pet. App. 4a. Were the statutes generally so limited, one would expect to find language to that effect in them. But none of these statutes says that it is inapposite as to criminal matters or that the privilege expires when the estate closes.

Indeed, the Uniform Rules of Evidence provide not only that the personal representative can claim the privilege,

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N.J. R. Evid. 504; N.M.R. Evid 11-503; N.D. R. Evid. 502; Oh. Rev. Code Ann. § 2317.02; 12 Okla. Stat. Ann. § 2502; Or. Rev. Stat. § 40.225; S.D. Codified Laws § 19-13-4; Tex. R. Civ. Evid. 503 and Tex. R. Crim. Evid. 503; Vt. R. Evid. 502; Wis. Stat. Ann. § 905.03.

[23] This Court's 1972 Proposed Federal Rule of Evidence 503(c) would have maintained the privilege after death. *See* 56 F.R.D. 183, 236, 240 (1972). This Court in *Jaffee* found that the Proposed Rule relating to the psychotherapist privilege supported the position reached in that case. 518 U.S. at 14-15.

[24] State legislative support for the proposition that the attorney-client privilege survives death is far more consistent than the state support for the psychotherapist privilege that this Court found significant in *Jaffee*. 518 U.S. at 14 n.13, 26 (Scalia, J., dissenting). *Jaffee*, of course, recognized a new federal privilege; here we attempt to *preserve* an application of a long-recognized privilege that has been widely accepted by state legislatures and state and federal courts.

but also that "[t]he person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client." Uniform Rule 502(c). That provision—which on its face applies to any type of proceeding—is also common in state evidence codes,[25] and is found in the Arkansas statute that governs Mr. Foster's still-open estate.[26] Nothing in these statutes indicates that the privilege is limited, following the client's death, to civil proceedings. In *Cooper v. Oklahoma*, *supra*, 661 P.2d at 907, the court, citing a statute adopting Uniform Rule 502(c), allowed the deceased's attorney to claim privilege when called by the defense in a criminal prosecution.

The court of appeals and Independent Counsel draw their principal support from certain academic commentators. But even the commentators supporting Independent Counsel's view concede that the case law is otherwise. 1 *McCormick on Evidence*, § 94, at 348 (4th ed. 1992) ("The accepted theory is that the protection afforded by the privilege will in general survive the death of the client."); *Restatement (Third) of the Law Governing Lawyers* § 127 comment c (Proposed Final Draft No. 1, March 29, 1996) ("The privilege survives the death of the client. A lawyer for a client who has died has a continuing obligation to assert the privilege."); [27] *Wolfram, Modern Legal Ethics* § 6.3.4, at 256 (1986) ("In general, courts hold that the death of the client does not end the

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[25] Of the statutes cited in note 22, a provision allowing the lawyer at the time of the communication to claim the privilege appears in the statutes of Alabama, Alaska, Arkansas, Delaware, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maine, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Vermont and Wisconsin.

[26] Ark. Code Ann. § 16-41-101, Rule 502.

[27] After describing the testamentary exception, the Reporter's Note states that, where this exception does not apply, the cases "routinely hold that the privilege survives." *Restatement*, *supra*, § 127 Reporter's Note.

privilege"); 24 Wright & Graham, *Federal Practice and Procedure* § 5498 at 483 (1986) (conceding that the "common law rule" is as stated by Wigmore—that the privilege, "being intended to secure a confidence on the client's part that no disclosure will be made . . . does not cease . . . upon the death of the client."); 2 Mueller & Kirkpatrick, *Federal Evidence* § 199 at 379 (2d ed. 1994) ("It is generally held that the privilege is not terminated even by the death of the client, although this view has been sharply criticized by commentators.") *Moreover, none of these commentators supports the court of appeals' view that there should be one rule for civil cases and another for criminal cases.*

Other prominent commentators argue forcefully that the rule should not be changed. Wigmore asserts:

> The subjective freedom of the client, which it is the purpose of the privilege to secure . . . could not be attained if the client understood that, when the relation ended or even after the client's death, the attorney could be compelled to disclose the confidences, for there is no limit of time beyond which the disclosures might be used to the detriment of the client or of his estate.

See, 8 Wigmore, *Evidence* § 2323 (McNaughton rev. 1961). *See also* Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics, 45, 78-79 (1992): "[i]ndividuals do usually care about the dissemination of information about themselves, even after their deaths, and this concern will lead them to confide more fully in attorneys if they know that the privilege will outlive them." Other commentators recognize that the privilege survives death and make no call for changing the rule. Hazard and Hodes, *The Law of Lawyering*, § 1.6:101 at 131 (1998); *Weinstein's Federal Evidence*, § 503.32 at 503-96 (2d ed. 1997); Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, at 234 (3d ed. 1997); Rice, *The Attorney-Client Privilege in the United States*, §§ 2.5, 2.6 (1993).

4. Apparently recognizing the harmful effects of a broad rule allowing posthumous disclosure, the court of appeals attempted to limit the damage by confining disclosure to "the discrete zone of criminal litigation." Pet. App. 8a. But a client's concern for family, friends and associates surely will extend to their potential criminal as well as civil liabilities. An elderly or dying person may be troubled far more by a loved one's possible incarceration than by diminution of an inheritance caused by some civil sanction. Especially given the increasing utilization of criminal law as a means of commercial and ethical regulation, a client who believes that death is a not-too-distant possibility may be loath to speak to a lawyer about criminal problems involving friends, family or close associates if advised that confidentiality evaporates upon his or her demise.

The court of appeals attempted to distinguish between criminal liability, which "will have ceased altogether [after death]," and civil liability, which "characteristically continues" and which clients would wish to avoid in order to "preserve their estates [after death]." Pet. App. 6a. But as a practical matter, civil and criminal liability cannot be separated so easily. Disclosures made in the criminal context could be used in related civil matters, and a client's estate may be decimated as a result of criminal proceedings after his or her death. For example, a child's drug activities could lead to civil forfeiture of estate property. *See, United States v. One Parcel of Property, at 31-33 York Street*, 930 F.2d 139 (2d Cir. 1991) (house belonging to mother forfeited because sons used it for drug sales); *cf. Bennis v. Michigan*, 516 U.S. 442 (1996) (automobile partially owned by wife forfeited because husband used it for illegal sexual activities). Moreover, disclosure could cause investigation, prosecution, or conviction of an heir of the deceased client, which could result in fines or attorney fees that deplete the portion of the estate left to that heir.

Thus, even if the court of appeals were right in its implicit counter-intuitive assumption that clients would care about the economic, but not the criminal, consequences of posthumous disclosure on friends and family, in the real world criminal liability may have severe economic consequences. Moreover, if the court of appeals were correct in holding that a plausible claim of necessity in the criminal context allows posthumous disclosure, scant reason exists to deny it where a party in civil litigation plausibly claims the evidence is critical. Upholding the court of appeals' decision inevitably will lead to deterioration of the privilege in both the criminal and civil spheres.

5. The balancing test fashioned by the court of appeals does not ameliorate the damage inflicted on attorney-client confidentiality. The client is unlikely to be reassured when told that the conversation will be confidential except for statements whose "relative importance" to the prosecutor is "substantial." Pet. App. 10a. "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond, supra*, 518 U.S. at 17 (1996) (patient-therapist privilege). Under the court of appeals' balancing test, the trial judge is most likely to perceive a need for privileged information in precisely those situations where the client would be most concerned about the criminal ramifications of disclosure on family, friends or associates. At the least, such a balancing test renders the attorney-client privilege uncertain, and "[a]n uncertain privilege is little better than no privilege at all." *Upjohn Co. v. United States, supra*, 449 U.S. at 393.

6. There is no merit to the court of appeals' argument that the privilege already is so beset with exceptions that one more will make little difference. Pet. App. 8a-10a.

The court cited the so-called "crime-fraud" exception, but for this exception to apply "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997). In addition, "the client must have carried out the crime or fraud." *Id.*[28] A client will know whether he or she consults an attorney to further a criminal or fraudulent scheme. And a client will know whether he or she, after receiving legal advice, has proceeded to commit a crime or fraud. Clients who are seeking advice in an attempt to comply with the law, or to lessen the consequences of past violation, are unlikely to be deterred from candor by advice that confidentiality may be destroyed by an intent to commit a future crime or fraud, followed by actual commission of the intended wrongdoing. The same cannot be said about an elderly, severely ill or suicidal client who is told that confidentiality will perish with death.

The court of appeals also invoked the "ubiquitous exception for litigation between persons claiming under the decedent" (Pet. App. 9a)—otherwise known as the testamentary exception. But disclosure is allowed in testamentary disputes for the purpose of determining the decedent's intent. *Glover v. Patten*, 165 U.S. 394, 406-08 (1897); *United States v. Osborn, supra*, 561 F.2d at 1340 n.11. "[I]f the decedent could be asked, he would want to waive the privilege so that the lawyer could dispose of the property according to his wishes." Hazard and Hodes, *The Law of Lawyering*, § 1.6:101 at 131 n.5.7 (1998). An exception designed to implement client intent does not support creating another exception to thwart it. Indeed,

[28] "In other words, the [crime-fraud] exception does not apply even though, at one time, the client had bad intentions. Otherwise, 'it would penalize a client for doing what the privilege is designed to encourage—consulting a lawyer for the purpose of achieving law compliance.'" *In re Sealed Case, supra*, 107 F.3d at 49, quoting *Restatement of the Law Governing Lawyers*, § 142 comment c, at 461 (Proposed Final Draft No. 1, 1996).

Glover, the leading case on the testamentary exception, is premised on the assumption that, except in that context, the privilege applies after death.

To be sure, as the court of appeals noted, there may be cases where implementation of testamentary intent necessitates disclosure of embarrassing information, such as the existence of an illegitimate child. Pet. App. 9a.[29] But it is fair to presume that the client would have wanted his or her testamentary intent fulfilled, even at the cost of an embarrassing disclosure. By contrast, disclosure in criminal proceedings about the client's family, friends or associates is not designed to implement the client's intent, and may have far more drastic consequences than mere embarrassment or hurt feelings. In that situation, a court cannot presume that, if the "decedent could be asked, he would want to waive the privilege." Hazard and Hodes, *supra*.

Finally, the court of appeals refers to decisions suggesting that criminal defendants in some situations may have a constitutional right to obtain and use as evidence otherwise privileged exonerating statements. Pet. App. 10a, citing dicta in *John Doe Grand Jury Investigation*, *supra*, 562 N.E.2d at 71-72; *South Carolina v. Doster*, *supra*, 284 S.E.2d at 220. There also are decisions by this Court holding that certain privileges created by state statute must yield to a defendant's constitutional right to confront or to obtain exculpatory information.[30] These cases at

[29] The governing statute in New York creates an exception from the testamentary rule for any privileged communication "which would tend to disgrace the memory of the decedent." N.Y.C.P.L.R. § 4503(b) (McKinney's 1992).

[30] *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Davis v. Alaska*, 415 U.S. 308 (1974). *See also United States v. Scheffer*, 118 S.Ct. 1261, 1264 (1998), where this Court (in a context not involving a privilege) said that exclusion of evidence may be "unconstitutionally arbitrary or disproportionate" where it "has infringed upon a weighty interest of the accused."

least suggest that courts may be inclined to find appropriate ways to protect a defendant's constitutional rights where privilege is claimed.[31]

But this case involves not a criminal defendant, but a *prosecutor's* attempt to obtain privileged evidence. The Court can decide the present matter without reaching the different issue of a defendant's possible constitutional right to privileged material.[32] If such a right exists, it would reflect our constitutional system's particular concern in avoiding jailing the innocent—a concern that affords criminal defendants unique rights.[33] To allow a prosecutor to break the privilege on the ground that a grand jury's constitutional right to investigate is on a par with possible constitutional rights of a criminal defendant would be a radical, problematic step fraught with unforeseen consequences.

[31] However, several state cases refused to allow an attorney to testify as to confidential communications from a deceased client, even though the evidence was sought to assist in the defense of a criminal prosecution: *Mayberry v. Indiana*, 670 N.E.2d 1262 (Ind. 1996); *People v. Modzelewski*, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994); *Arizona v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976), *cert. denied*, 439 U.S. 1006 (1978); *People v. Pena*, 198 Cal. Rptr. 819, 828-29 (Cal. Ct. App. 1984); *Cooper v. Oklahoma*, 661 P.2d 905, 907 (Okla. Crim. App. 1983); *South Carolina v. Doster*, 284 S.E.2d 218, 220 (S.C.), *cert. denied*, 454 U.S. 1030 (1981). *Compare, Valdez v. Winans*, 738 F.2d 1087 (10th Cir. 1984), discussed at n. 6 *supra*. *But see District Attorney v. Magraw*, 628 N.E.2d 24 (Mass. 1994); *Arizona v. Gause*, 489 P.2d 830 (Ariz. 1971), *vacated on other grounds*, 409 U.S. 815 (1972); and *Wyoming v. Kump*, 301 P.2d 808 (Wyo. 1956) where, because of conflict or lack of authority, courts refused to allow a husband accused of murdering his wife to assert her attorney-client privilege.

[32] *Compare Jaffee*, *supra*, 518 U.S. at 18.

[33] For example, the prosecution must prove its case beyond a reasonable doubt; the defendant, innocent until proven guilty, may stand mute. The prosecution cannot appeal an acquittal; the defendant may appeal a conviction.

There is also a basic flaw in the argument that one more exception to the privilege should not be unduly injurious, given those that exist. Despite the extant exceptions, the attorney-client privilege still is vital to our system of justice. All citizens—including the elderly and seriously ill—still have a right to talk to an attorney in confidence. The courts still have a paramount interest in assuring that clients tell their attorneys the whole truth. Most attorneys still take seriously their professional obligation to preserve confidences. Contrary to the court of appeals' conclusion, in most circumstances "belief in an absolute attorney-client privilege" is not, and should not be, "illusory." Pet. App. 8a. The court of appeals' reasoning can only further a progressive erosion of the privilege, as each added exception fuels the argument that yet one more can do little additional harm.

II. ATTORNEY NOTES TAKEN AT AN INITIAL CLIENT INTERVIEW ARE ENTITLED TO THE VIRTUALLY ABSOLUTE WORK PRODUCT PROTECTION AFFORDED AN ATTORNEY'S MENTAL IMPRESSIONS.

The court of appeals' determination that the notes at issue are not protected by the heightened work product standard rests on the apparently conclusive presumption that an attorney, in an initial client interview, is a passive note-taker and exercises no professional judgment in choosing what to record. Even Independent Counsel, in his opposition to the petition for a writ of certiorari, declined to defend this bizarre notion, which is contrary to existing law, the facts of this case, and the experience of the seasoned practicing attorneys whose views are expressed here by amici attorney associations.

1. The work product privilege "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). A

lawyer preparing a case must "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). If materials reflecting the lawyer's thoughts were open to opposing counsel, "much of what is now put down in writing would remain unwritten." *Id.* "Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. . . . And the interests of the clients and the cause of justice would be poorly served." *Id.*[34] "Although the work product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." *United States v. Nobles, supra*, 422 U.S. at 238.

From its adoption in the seminal decision of *Hickman v. Taylor, supra*, the work product privilege has been applied to attorneys' notes of witnesses' oral statements. In *Hickman*, the Court refused to require disclosure of "what [the attorney] saw fit to write down regarding witnesses' remarks." 329 U.S. at 513. The Court also accorded work product protection to attorney notes and memoranda of witness interviews in *Upjohn Co. v. United States, supra*. *Upjohn* held that "memoranda based on oral statements of witnesses" must be given "special protection" under Rule 26. 449 U.S. at 400. The Court reasoned that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends

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[34] Some insight into what the Court may have meant by "sharp practices" may be gained from the transcript of oral argument in *Hickman v. Taylor*. When asked by Justice Jackson what the practical effect would be of requiring production of the attorney interview notes, counsel responded: "In my judgment, interviews will go unrecorded, unpleasant sources will not be pursued, and counsel will be tempted to keep files under his bed at home." Quoted in 1 *McCormick on Evidence* § 96 at 358 (4th ed. 1992).

to reveal the attorney's mental processes." *Upjohn Co. v. United States, supra,* 449 U.S. at 399.

Hickman and *Upjohn*, as well as lower court cases,[35] accorded heightened protection to initial *witness* interviews. The issue of work product protection for intial *client* interviews has not previously arisen (presumably because client interviews, until this case, have been protected by the attorney-client privilege). But there is even more reason to grant heightened work product protection to client interviews. At a witness interview, the attorney's principal focus likely is to elicit facts. By contrast, at a client interview—particularly an initial interview—the attorney also may outline the legal situation, discuss possible approaches, and explain the consequences and risks of various courses of action. For this reason, the notes of a client interview, even more than a witness interview, are likely to be permeated by the "attorney's mental processes." *Upjohn Co. v. United States, supra,* 449 U.S. at 687.

2. The court of appeals held that "the ordinary Rule 26(b)(3) standard should apply" in determining whether an attorney's notes of an initial client interview must be produced to the prosecutor. Pet. App. 14a. Under that standard, the prosecutor obtains access to work product upon showing a "substantial need" for the material and inability to obtain the "substantial equivalent" of the material by other means "without undue hardship." Fed. R. Civ. Proc. 26(b)(3). But application of the ordinary Rule 26(b)(3) standard to attorney notes of initial client interviews transgresses *Upjohn* and the policies underlying the work product privilege.

The magistrate in *Upjohn*, as did the court of appeals here, applied the "substantial need" and "without undue

[35] *E.g., In re Allen*, 106 F.3d 582, 607 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 689 (1998); *Cox v. Administrator, U.S. Steel*, 17 F.3d 1386, 1421-23 (11th Cir.), *modified on reh'g on other grounds*, 30 F.3d 1347 (11th Cir.), *cert. denied*, 513 U.S. 1110 (1994).

hardship" tests of the ordinary Rule 26(b)(3) standard. 449 U.S. at 401. This Court reversed, holding that "a far stronger showing of necessity and unavailability by other means" is required. 449 U.S. at 401-2. The Court recognized that the lower courts had split on the degree of protection allowed attorney interview notes of witness interviews, with some courts holding that "*no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses," and others holding that such material is entitled to "special protection."[36] But the Court concluded that it need not resolve this conflict, because under either test the lower court had erred in applying the ordinary Rule 26(b)(3) standard. 449 U.S. at 401-02.

Subsequent lower court decision have followed *Upjohn*, holding that attorney interview notes are producible, if at all, "only in very rare and extraordinary circumstances." *In re Allen, supra,* 106 F.3d at 607; *Cox v. Administrator, supra,* 17 F.3d at 1421-23 (same); *In re Sealed Case,* 676 F.2d 793, 809-10 (D.C. Cir. 1982) ("extraordinary justification" required for disclosure).[37]

[36] 449 U.S. at 401 (emphasis in original), citing *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973) (absolute protection); *In re Grand Jury Investigation*, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (same); *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979) (disclosure in "rare situations").

[37] Independent Counsel previously has relied on two cases, but they do not support the court of appeals' application of a lesser standard. In *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979), the Third Circuit rejected absolute protection, concluding that attorney interview notes are producible in a "rare situation." 599 F.2d at 1231. It found the "rare situation" standard met in part because of the interviewee's death and in part for other reasons. 599 F.2d at 1231-32. In *In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982), the Second Circuit, after noting that "the mental processes and legal theories of the interviewing attorney . . . are entitled to the greatest protection available under work-product immunity," held that, under the circumstances of that case, production of attorney interview notes would not reveal the attorney's mental processes.

The court of appeals asserted that *Upjohn* "did not decide whether factual elements embodied in [attorney interview] notes should be accorded the virtually absolute protection that the privilege gives to the attorney's mental impressions." Pet. App. 12a. It rested this conclusion on its assumption that the factual portions of the interview notes at issue in *Upjohn* were covered by the attorney-client privilege and thus were not involved in the Court's work-product ruling. Pet. App. 12a-13a. In fact, the interview notes on *Upjohn* included notes of interviews with seven former employees of the client company and this Court expressly said that its work product "discussion will also be relevant to counsel's notes and memoranda of interviews with [these seven] should it be determined [by the lower courts on remand] that the attorney-client privilege does not apply to them." 449 U.S. at 394 n.3, 397 n.6.

Moreover, the Court's reasoning in *Upjohn* made clear that the special protection afforded attorneys' "mental processes" extended to the factual portion of the interview notes. The Court equated "the attorney's mental processes" with "what he saw fit to write down," including "what [the attorney] considered to be the important questions, the substance of the responses to them . . . ." 449 U.S. at 399, 400 n.8 (quoting *Hickman v. Taylor, supra,* 329 U.S. at 516-17). The Court also relied on Justice Jackson's statement in *Hickman* that attorney interview notes are protected partly because they are in the attorney's "language, permeated with his inferences." *Hickman, supra,* 329 U.S. at 516-17 (Jackson, J., concurring), quoted in *Upjohn,* 449 U.S. at 399-400.

The notes taken by Mr. Hamilton were not verbatim, but were cast in his language. They reflect Mr. Hamilton's own "selections, interpretations, and interpolations"; as such, the notes "could not fairly be said to be the witness' own statement." *Palermo v. United States,* 360 U.S. 343, 350 (1959). Because they contain the attorney's language and selections rather than Mr. Foster's statement, they

would not be a "statement" producible under the Jencks Act.[38] For much the same reason, the notes are entitled to special protection under the work product privilege, reflecting as they do the attorney's perceptions of the case and his "mental processes" as he began to review the case.

Applying the ordinary standard of need of Rule 26(b)(3) to attorney interview notes has the effect of destroying the "privileged area within which [the attorney] can analyze and prepare his client's case." *United States v. Nobles, supra,* 422 U.S. at 238. At the time of taking interview notes, an attorney cannot possibly know how a court might view a prosecutor's assertion of "need" or unavailability of "substantially equivalent" material "without undue hardship." If disclosure hinges on application of those tests under the ordinary Rule 26(b)(3) standard, the attorney and client could be at peril whenever the attorney takes interview notes. The inevitable result would be that "much of what is now put down in writing would remain unwritten"—degrading the quality of case preparation and, ultimately, the administration of justice. *Hickman v. Taylor, supra,* 329 U.S. at 511.

3. The court of appeals apparently believed that the damaging effect of applying the ordinary Rule 26(b)(3) standard could be limited by confining it to attorney notes of initial client interviews. Pet. Ap. 13a. But it is particularly important not to discourage attorney note-taking at this stage. As recognized by a widely-used manual on trial technique, an accurate record of the initial interview is important because "[y]our client will never have a better

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[38] *See, Palermo v. United States,* 360 U.S. 343, 352-53 (1959) ("summaries of an oral statement which evidence substantial selection of material . . . are not to be produced"); *United States v. North American Reporting, Inc.,* 761 F.2d 735, 740 (D.C. Cir.) (notes "contain[ing] incomplete, episodic statements" are not witness statements) *cert. denied,* 474 U.S. 905 (1985); *United States v. Fowler,* 608 F.2d 2, 6 (D.C. Cir. 1979) ("short [and] very cryptic," "incomplete" notes "set[ting] forth a few references to scattered facts" are not witness statements).

grasp of the pertinent facts than at this stage." Lane, *Goldstein Trial Technique* § 1.03 at 3 (3d ed. 1996). Adequate notes taken "while the matter is fresh in the client's mind will prevent a later sketchy and perhaps incomplete recall of the facts" and "will prove extremely helpful, particularly where the trial takes place several years in the future." *Id.*, § 1.05 at 4.

Moreover, a client's subsequent recollections may be tainted by the "education" he or she acquires, during the course of litigation, as to what the facts "should" be in order to prevail. A lawyer who has taken adequate written notes at the initial interview will be better equipped to ensure that the client does not deviate from the truth to accommodate his or her developing perception of legal or tactical advantage. A rule that hampers the ability of a lawyer to perform this function only can injure the administration of justice. *Hickman v. Taylor, supra,* 329 U.S. at 511.

Nor can the danger of discouraging note-taking at initial client interviews be ameliorated by redaction, as the court below suggests. Pet. App. 14a. The redaction procedure presumes that the policies of the work product privilege are satisfied if explicit expressions of the attorney's opinions and mental impressions are protected from disclosure. But attorney interview notes also should be protected because disclosure would "tend[] to reveal the attorney's mental processes" by revealing " 'what he saw fit to write down regarding witnesses' remarks.' " *Upjohn Co. v. United States, supra,* 449 U.S. at 399, quoting *Hickman v. Taylor, supra,* 329 U.S. at 513. Redacting explicit statements of opinion from attorney notes is thus insufficient to protect the attorney's mental processes.

4. The court of appeals was particularly misguided in creating an apparently conclusive presumption that a lawyer taking notes at an initial interview "has not sharply focused or weeded the materials," thus rendering inappropriate the heightened protection accorded to "the attorney's

mental processes." *Upjohn Co. v. United States, supra,* 449 U.S. at 399. This argument ignores the reality of the practice of law. As amici attorney associations confirm, it is totally unrealistic to assume that the lawyer plays a passive role in an initial interview, simply recording facts to be shaped into legal theories at some later stage. Instead, the initial interview serves the dual purpose of "obtaining an exhaustive account of the client's predicament *and outlining available solutions.*" Lane, *Goldstein Trial Technique* § 1.03 at 3 (3d ed. 1996) (emphasis added). At the initial interview, the attorney's task is not only to elicit facts, but also to "explore various approaches and possible action to be taken." *Id.*, § 4.02 at 5. Inevitably, as part of that process, the lawyer will wish to explore certain factual areas more intensely than others. And in recording the interview, the lawyer will emphasize certain factual elements over others, depending on his or her concept of what the problem areas are and what approaches might be fruitful. For these reasons, an attorney's account of an initial interview typically is cast "in language permeated with his inferences." *Hickman v. Taylor, supra,* 329 U.S. at 516-17 (Jackson, J., concurring).

The court below argued that an initial client interview is not deserving of special protection because the lawyer may encourage the client to engage in "a fairly wide-ranging discourse." Pet. App. 13a. While this may be true, the issue is not what the client says at the initial interview, but which portions of the client's "discourse" the attorney chooses to record and the words he or she selects to accomplish this. It is these choices the attorney's notes reflect and the work product privilege protects. *Upjohn Co. v. United States, supra,* 449 U.S. at 399.

The court of appeals' presumption that the lawyer is not sufficiently knowledgeable to play an active role at the initial interview also ignores the record of this case. Mr. Hamilton came to the meeting with Mr. Foster with considerable experience in highly-publicized, "political" cases.

As many attorneys do, he prepared for the "initial interview"; the record shows that he had read and taken notes on the White House's report on the Travel Office matter. Pet. App. 40, 41.

Moreover, as Judge Tatel observed, the notes themselves demonstrate that Mr. Hamilton exercised his professional judgment during the interview. "In two hours, he created only three pages of notes," which were not verbatim but contained only what "he thought significant, omitting everything else." Pet. App. 31a. Three pages of notes, to memorialize a two-hour interview, must be the product of a high degree of professional selectivity. The notes, as Judge Tatel observed, bear various markings ("check marks and question marks") and "clearly represent the opinions, judgments, and thought processes of counsel." *Id.*

The record thus fully supports the district court's factual finding that Mr. Hamilton's "written notes reflect the mental impressions of the lawyer . . . ." Pet. App. 42a. The court of appeals' conclusion to the contrary is unsupported by the record and fatally infected by the erroneous conclusive presumption that lawyers do not exercise professional judgment when they take notes during initial client interviews.

5. The court of appeals' work product decision, when coupled with its ruling on the attorney-client privilege, will have dire practical results. If clients are advised that their disclosures to an attorney might be unprotected after death, they may not talk candidly. If lawyers are advised that their notes of initial client interviews may be available to a grand jury, they may cease taking notes. The net result will be to degrade the administration of justice —lawyers are less likely to know the full truth about their clients' conduct and will not have a written record of what their clients initially said. And there will be no offsetting benefits, because grand juries will not benefit from client

statements that are not made and notes that are not taken. As Judge Tatel's dissent correctly observed, the court of appeals' "two new holdings—one chilling client disclosure, the other chilling lawyer note-taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process." Pet. App. 31a-32a.

CONCLUSION

The judgment of the court of appeals should be reversed.

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No. 97-1192

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Supreme Court of the United States
OCTOBER TERM, 1997

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UNITED STATES OF AMERICA,
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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Faced with indefensible rulings by the court of appeals, Independent Counsel advances different positions. As to attorney-client privilege, he disavows the court of appeals' balancing approach, instead arguing flatly that "the attorney-client privilege does not apply in federal criminal proceedings when the client is deceased." Br. 9 (upper case omitted). Indeed, he specifically asks this Court to order production of relevant portions of the notes, although the court of appeals required the district court to engage in a balancing process before ordering production. Pet. App. 10a-11a, 13a-14a; compare Br. 41 n.40, 49. Because Independent Counsel did not file a cross petition, his request to alter the judgment is improper. *Northwest Airlines v. County of Kent, Michigan*, 510 U.S. 355, 364-65 (1994); Stern & Gressman, *Supreme Court Practice* (7th ed.) § 6.35.

As to work product, Independent Counsel does not attempt to defend the court of appeals' holding that notes of an initial client interview cannot reflect the attorney's

mental processes, arguing instead that the work product privilege, like the attorney-client privilege, expires with the client's death. He also seeks an order directing production of all relevant portions of the notes, a relief broader than that entered by the court of appeals. Br. 49; Pet. App. 12a. This he cannot do without a cross-petition. *Northwest Airlines, supra.*

In any event, Independent Counsel's positions, like those of the court of appeals, should be rejected.

I. ATTORNEY-CLIENT PRIVILEGE.

A. Confidentiality is necessary to foster candor between client and attorney.

1. Independent Counsel argues that "the rule that the privilege does not apply after death in criminal proceedings should cause *no* chilling effect whatsoever on *appropriate* attorney-client communications—that is, on clients who intend to testify truthfully or assert the Fifth Amendment." Br. 39 (emphasis in original). In other words, his position is that only those who intend to commit perjury will be restrained by such a rule. This argument, however, is contrary to case law, common sense, and the experience of the legal profession reflected in the briefs of amici attorney associations, which Independent Counsel ignores.

The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also United States v. Zolin*, 491 U.S. 554, 562 (1989); *Fisher v. United States*, 425 U.S. 391, 403 (1976). The privilege promotes free and unrestrained conversations by ensuring that these conversations are, and remain, "off the record," and is intended to benefit *all* clients in need of legal advice. Common sense and the legal profession's experience teach that even truthful people may need to talk to a lawyer in confidence and that those conversations may well be chilled by fear of disclosure after death. The rule that the privilege survives death is not intended to benefit the perjurer.

Independent Counsel recognizes the "importance" of the attorney-client privilege when the client asserts the Fifth Amendment privilege. Br. 33. However, he suggests that, because the deceased client cannot be prosecuted, the client planning to assert this privilege would not be chilled by the prospect of the attorney's revealing their conversations after death. This disregards the obvious harm such disclosure could have on the client's reputation and the fate of others.

Independent Counsel contends that federal law recognizes the attorney-client privilege in cases *where the client testifies* for two reasons. Br. 35-37. First, if the client testifies there is little need for the attorney also to do so. Second, to allow the attorney to testify would create a litigation side-show focusing on discrepancies between the attorney's and the client's testimony. But Independent Counsel overlooks the most salient reason for recognizing the privilege: to encourage candid conversations between the attorney and the client. Fear of revelation of those candid conversations after death would chill them.

To abandon the need for candor as the basic reason for the privilege would throw its legitimacy into doubt even for the living. The litigation side-show rationale is insufficient to support the privilege because it would not protect the privilege in pretrial discovery. Moreover, neither that rationale nor the claim that the attorney's testimony is unnecessary justifies the privilege when the client is unavailable to testify because of flight, illness, or loss of memory. The Fifth Amendment analogy is an inadequate justification because it has no application in purely civil matters. Encouragement of candor, therefore, remains the chief reason for the privilege.

Clients must be able to talk freely and without restraint with attorneys "if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980). The client who is overly cautious and circumspect may fail to reveal matters the lawyer should know. Lawyers doing their job *encourage* clients freely to express their suppositions, emotions, doubts, fears, speculations, and the like.

Once the client has freely confided in the lawyer, the lawyer can help sort the relevant from the irrelevant, separate what the client actually knows from guesswork and speculation, assist the client in thinking through apparent inconsistencies, and prod the client into testing personal recollections against available documents and the statements of others. After that process, the lawyer will have an accurate basis for giving advice, and the client will be better equipped to present a cogent, *truthful* account, if testimony is required.[1] But this process—which is fully appropriate and replicated daily in law offices across the country—cannot operate effectively unless the client is first able to confer with a lawyer in confidence without restraint.

The difficulty of sorting a client's surmises and speculations from actual knowledge is particularly acute when the client speaks about the activities of friends, family or associates. Here suspicion may be more prevalent than knowledge. A client knowing that the conversation with counsel is confidential can—and often should—voice all his or her fears and suspicions about others, even if they have little foundation. But it could well be irresponsible to impugn others by speculation and surmise knowing that a prosecutor or a grand jury could become privy to the conversation. That is one reason why a person who intends to be truthful in later testimony must be able to speak first with a lawyer in confidence. Independent Counsel's suggestion that a client may not, in a privileged setting, retain and consult a lawyer about the legal difficulties of others (particularly those relating to his or her own conduct) is simply wrong.[2]

[1] It is much too simplistic to say, as Independent Counsel does, that "[t]he client who will testify truthfully . . . will simply tell her attorney the same *facts* that she will disclose under oath." Br. 35 (emphasis in original). Anyone who has practiced law knows that, *even as to the wholly truthful client*, some aspects of the private conversations with the lawyers may differ from later "on the record" testimony. At any given time (even just before the client's death) the lawyer, and perhaps the client, may not know with any completeness what the "facts" are, particularly if the matter is complex and involves multiple parties. We expect that what Independent Counsel eventually wants from Mr. Hamilton is not just "facts," but his testimony about everything, speculations included, Mr. Foster said to him. To allow that sort of probing into an attorney's recollections of a conversation with a client would chill client candor and have pernicious effects on the practice of law and the administration of justice.

In short, Independent Counsel's position that only intended perjurers will eschew candor if they fear their conversations with counsel will be posthumously revealed contravenes reason and experience. Clients who intend truthful testimony, as well as those who intend to assert their Fifth Amendment privilege, also would be restrained.

2. Independent Counsel concedes that clients anticipating death may care about their reputation and about the fate of family, friends and associates. Br. 43-44. He argues, however, that a client's desire to protect others and his or her own reputation does not justify nondisclosure after death because the client could be forced to testify about such matters before death. "*[T]he information*" disclosed by the attorney, he says, "*is the same factual information that the client himself would have been legally required to disclose if he were alive.*" Br. 44 (emphasis in original). This argument attacks the very fundamentals of the privilege.

The attorney-client privilege is not intended only to protect incriminating information the client cannot be forced to reveal. Rather, it is based chiefly on the need to foster client candor. If a client anticipating death cannot talk to a lawyer freely about matters implicating fam-

[2] *See* Br. 29. Independent Counsel asserts that a person consulting an attorney "to enable the attorney to advise or assist someone else" may not claim the privilege. Br. 45 n.45, quoting Larkin, *Federal Testimonial Privileges* § 2.02 at 2-17. But a client may want legal advice for the client's own benefit about the activities of friends, family and associates, either because that conduct may implicate the client or for other reasons. As long as the person consulting the attorney is seeking legal advice (rather than arranging for the attorney to provide advice to someone else), he or she is entitled to the privilege.

ily, friends, associates and his or her own reputation because the lawyer later might be turned into a funnel to the prosecutors, the client might well not talk at all—and thus there would be no information to discover. It thus is not at all clear, as Independent Counsel argues, that the costs of protecting attorney-client communications after death are high, because if the privilege dissipates upon death such communications might not be made.

As discussed above a client's discussion with a lawyer may be expansive, involving speculation, rumor, factual uncertainties, and the like. That a client later could be required to testify about certain facts after receiving professional assistance and advice should not make such wide-ranging conversations any less confidential. To conclude otherwise would be to squelch the types of communications necessary for the legal system to function.

B. There is no basis for Independent Counsel's assertion that the chilling effect of posthumous disclosure would be "marginal."

Independent Counsel concludes—contrary to the views of amici attorney associations—that the chilling effect of the rule he espouses would be "extraordinarily marginal." Br. 39. None of his arguments in this regard has merit.

1. Independent Counsel suggests that clients will not be chilled because they will not learn about the confidentiality exception he proposes. Br. 39-40. We have no doubt, however, that any decision by this Court vitiating the privilege after death would receive widespread publicity, particularly among the aged and ill.

2. Independent Counsel asserts that clients already are chilled by the lawyer's obligation to reveal client perjury. As remarked, however, even truthful people often need to talk to a lawyer in confidence. For the truthful client, fear of what the lawyer might do if perjury occurred would *not* be important. But fear of disclosure after death—particularly where the client is elderly, ill or suicidal—would chill candor, and that is why the privilege should survive death.

3. Independent Counsel rightly observes that prosecutors rarely have sought disclosure of attorney-client communications after the client's death. This is the first reported federal case; there is only one reported state case.[3] This circumstance may be because prosecutors with "the perspective that multiple responsibilities provide"[4] understand that the law is settled and that ultimately the government and law enforcement benefit if clients are candid with their attorneys. However, if this Court holds such evidence obtainable, federal prosecutors will have no choice but to seek it and inhibited candor will be the by-product.

4. Independent Counsel contends that grand jury secrecy and admissibility rules will minimize the chilling effect of the disclosure he seeks. But a client would be restrained by the prospect that friends, family or associates could be indicted as a result of disclosure, even if the evidence that led to indictment is not admissible at trial. Moreover, inadmissible attorney writings might be utilized at trial, for example, to refresh recollection or to cross-examine. Lack of admissibility would not ensure that attorney-client information remains confidential.

5. To disparage the chilling effect of posthumous disclosure, Independent Counsel *repeatedly* asserts that criminal prosecution after death would not affect the client's estate. Br. 9, 16 n.11, 22, 29. This contention rests on the bizarre notion that persons contemplating death care only about the magnitude of their estates and not about whether family, friends or associates might be incarcerated —a notion contrary to reason and experience. This assertion also is demonstrably wrong, for criminal proceedings can decimate an estate by leading to property forfeitures,

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[3] *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990). In the other state cases excluding such evidence from criminal trials (cited in our principal Brief at 19 n.16), the defense sought the evidence; the prosecution opposed.

[4] *Morrison v. Olsen*, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting).

fines, restitution, and huge legal fees.[5] Even from a purely economic standpoint, criminal proceedings can be at least as disastrous as civil proceedings, and both the court of appeals and Independent Counsel concede that the privilege survives death in civil proceedings because of the effect of a contrary rule on a decedent's estate.

C. There is no support for distinguishing between criminal and civil proceedings in applying the attorney-client privilege.

Independent Counsel argues that privileges that apply in civil proceedings may not apply in criminal proceedings. That may be true for certain *qualified* privileges, where a balancing test applies and the interests supporting disclosure in a criminal proceeding may be weightier than in a civil case. *See United States v. Nixon*, 418 U.S. 683, 711-12 & n.19 (1974) ("President's generalized interest in confidentiality"); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (journalist's privilege).[6] But the argument has no support in cases involving absolute privileges where balancing tests are not utilized.[7]

The civil-criminal distinction especially fails in the context of the attorney-client privilege. Lawyers frequently

[5] *See* United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (1998 ed.), §§ 5E1.1 (Restitution), 5E1.2 (Fines for Individual Defendants). Examples of statutes providing for forfeiture as a result of criminal conduct are: 18 U.S.C. § 981 (forfeiture for a list of offenses); 21 U.S.C. § 853 (forfeiture of assets traceable to narcotics violations); 18 U.S.C. § 1955(d) (forfeiture of property connected to illegal gambling); 26 U.S.C. § 7301 (forfeiture of property connected to tax avoidance); 18 U.S.C. § 1963(e) (forfeiture under RICO).

[6] *But see University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990) (*Branzburg* followed in a civil enforcement proceeding).

[7] Independent Counsel cites McCormick's statement that some state statutes deny the physician-patient privilege in criminal cases. Br. 11, citing 1 *McCormick on Evidence* § 104, at 388 (4th ed. 1992). However, McCormick concedes that, "[i]n the absence of specific limiting language, the [physician-patient] privilege will generally be held to apply to criminal as well as civil cases." *Id.* at 388 n.4.

are consulted in situations where both civil and criminal liability is possible. Matters concerning securities, tax, antitrust, fraud or RICO laws all could involve either civil or criminal liability.[8] It is nonsensical to contend, for example, that a conversation involving a client's liability under the securiites laws is inviolate after death in a civil case, but accessible by a grand jury. To attempt to explain such a dichotomy to a client hardly would foster client candor.[9]

D. The decision discriminates against the dying.

Independent Counsel argues that extinguishing the privilege at death would not discriminate against the dying because (1) they "most likely" would consult lawyers about wills or property dispositions, and (2) the will contest exception already negates the privilege. Br. 16-17, 45-46. However, while a person near death might be concerned about bequests and a will contest might develop (without which the exception does not apply), the client might well wish to consult a lawyer for some other purpose, including grand jury investigations that might involve the client or others. Mr. Foster, after all, did not seek out Mr. Hamilton to confer about estate planning. To rob the dying of

[8] *See, e.g.*, 18 U.S.C. §§ 1963 (RICO criminal penalties), 1964 (RICO civil liabilities); 15 U.S.C. §§ 1, 2 (antitrust criminal penalties), 15 (antitrust civil liabilities), 77k, 77l (Securities Act civil liabilities), 77x (Securities Act criminal penalties).

[9] Independent Counsel argues that disclosure is needed in criminal proceedings, because nondisclosure may allow " 'a murderer . . . still at large and likely to strike again' to evade justice." Br. 24 (quoting *In re John Doe Grand Jury Investigation, supra*, 562 N.E.2d at 73 (Nolan, J., dissenting)). Present ethical rules address public safety, allowing disclosure "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." ABA Model Rules of Professional Conduct, Rule 1.6(b)(1). While these rules do not directly concern possible future criminal conduct by third parties, they at least suggest that a lawyer's ethical obligations would not protect such information. In any event, the present case does not raise a public safety issue, and any "public safety" exception that might be fashioned likely would not depend on whether the client was dead.

confidentiality as to nontestamentary matters is discriminatory.

Independent Counsel also says there is no discrimination against the dying because the client must testify truthfully and the attorney "simply" must disclose the same information the client would have disclosed. We have dealt with the essence of this wrong-headed argument above, but here make an additional point. The dying would often know that, as a practical matter, they never will testify in a criminal proceeding because death will overtake other events. The Court will recall that Mr. Foster died only nine days after he spoke with Mr. Hamilton. Under either the court of appeals' or Independent Counsel's formulation, if the client near death declines to speak with a lawyer, his or her secrets go to the grave; but if the client does consult an attorney, whose advice may be desperately needed, disclosure of those secrets is a distinct possibility. To force this Hobson's choice on dying clients discriminates against them.

E. Existing law overwhelmingly supports survival of the privilege after death; the commentators are split.

Independent Counsel argues that the "vast majority" of state cases supports his position, as well as state statutes and the "virtual consensus" of commentators. Br. 14, 16. This claim is both wrong and misleading.

1. The "vast majority" of state cases Independent Counsel refers to involve the "testamentary exception" where the privilege is waived for the sole purpose of obtaining evidence as to the client's testamentary intent. Br. 16. But these cases, and the state statutes that codify the testamentary exception, recognize that it is just that—an *exception* to the general rule that the privilege survives death.[10]

[10] *See Glover v. Patten*, 165 U.S. 394, 408 (1897) (exception described as a "waiver" of the general rule of confidentiality); *Blackburn v. Crawfords*, 70 U.S. 175, 194 (1865) (same); *Hitt v.*

Independent Counsel argues that these cases represent a policy determination that correctly disposing of an estate trumps the interest in preserving the confidentiality of the deceased's conversation with counsel who drafted the will. The issue of whether a crime was committed and by whom, he then contends, is at least important as "who gets Blackacre," and the needs for such information "*are surely sufficient to trump the privilege after death.*" Br. 17 (emphasis in original).

But this analysis overlooks the basic notion that the "testamentary exception" is designed to implement the client's testamentary intent. This Court in *Glover v. Patten*, 165 U.S. 394, 408 (1897), recognized that this is so; numerous other cases concur.[11]

Attempting to find (or invent) similar intent in the criminal investigation situation, Independent Counsel makes an extraordinary statement. It is, he says "'fair to presume' that the client would have wanted to provide

Stephens, 675 N.E.2d 275, 278 (Ill. Ct. App.), *appeal denied*, 679 N.E.2d 380 (Ill. 1997) ("[t]he only context in which a client's death might affect the viability of the privilege is a will contest"); *Doyle v. Reeves*, 152 A. 882, 883 (Conn. 1931) (will contest rule is a "recognized exception"); *Succession of Norton*, 351 So. 2d 107, 112 (La. 1977) ("exception" to general rule that "the death of the client does not terminate the privilege").

Rule 502 of the Uniform Rules of Evidence describes the will-contest rule as an "Exception" to the "General Rule of Privilege," as do 18 of the statutes that adopt the Uniform Rules; Alabama, Alaska, Arkansas, Delaware, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, South Dakota, Texas and Wisconsin (cited in our principal Brief at 21-22 n.22). The California Evidence Code, § 953, also labels the will-contest rule as an "Exception."

[11] The cases cited in n.10 *supra* all state or indicate that implementing the client's testamentary intent is the basis for the testamentary exception. Examples of other cases relying on the client intent rationale are: *Clark v. Turner*, 183 F.2d 141, 142 (D.C. Cir. 1950); *Doherty v. O'Callaghan*, 31 N.E. 648, 650 (Mass. 1892); *In re Cunnion's Will*, 94 N.E. 648, 650 (N.Y. 1911); *Bergsvik v. Bergsvik*, 291 P.2d 724, 731 (Or. 1955); *Hugo v. Clark*, 99 S.E. 521 (Va. 1919); *Holty v. Landauer*, 52 N.W.2d 890, 892 (Wis. 1952).

relevant information to the grand jury." Br. at 19. He derives this supposed presumption from the citizen's duty to testify before the grand jury. But citizens also have a duty to pay taxes, and the Court should not presume that a client would want everything he says to his or her tax attorney revealed to the IRS. Nor can a similar presumption rationally be made in many grand jury situations where the client's own reputation may be at stake, as well as the fate of family, friends and associates. To base negation of the privilege at death on such a doubtful presumption would be to ignore reality. To apply the privilege after death in criminal proceedings, but not in will contests, will not create "an irrational asymmetry in the law" because reason and experience tell us that different presumptions as to client intent should pertain, as amici attorney associations confirm.

2. Independent Counsel also claims support from state statutes providing that the deceased client's personal representative may assert the privilege. He argues that criminal proceedings have no relevance to the administration of estates, and thus these statutes impliedly limit the posthumous privilege to civil proceedings.

None of these codes (including the Arkansas statute governing Mr. Foster's still-open estate) states that they are limited only to civil matters. Indeed, some have been applied in criminal cases to uphold the privilege.[12] Moreover, Independent Counsel is wrong to assert that criminal proceedings have no relevance to estate administration, because criminal proceedings may result, *e.g.*, in forfeitures that could deplete an estate. He also disregards the many state evidence codes (including Arkansas') that allow the deceased's *attorney* to claim the privilege—provisions that cannot be read as limited to civil proceedings. Indeed, one such statute has been applied in a criminal case.[13]

[12] In *People v. Pena*, 198 Cal. Rptr. 819, 828 (Cal. Ct. App. 1984), the court in a criminal trial relied on the California Code provision authorizing the decedent's personal representative to assert the privilege to sustain exclusion of a communication between the decedent and his attorney. *See also Cooper v. Oklahoma*, 661 P.2d 905, 907 (Okla. Crim. App. 1983) (citing similar provision of Oklahoma Code to support exclusion of decedent's privileged communication in a criminal trial); *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990) (allowing administratrix of decedent's estate to assert privilege in response to motion to compel attorney's testimony before grand jury).

3. Also relevant are the reason and experience reflected in bar and state ethics opinions. The consistent position is that the attorney's obligation of confidentiality survives death.[14]

4. Independent Counsel's assertion that he is supported by a "virtual consensus" of "overwhelming scholarly authority" (Br. 12-15) exaggerates. The commentators' views are canvassed in our opening brief (at 23-24). Suffice it to say here that all commentators concede that the case law supports posthumous application of the privilege; that none supports the view that the posthumous privilege operates differently in criminal and civil proceedings;[15] that certain commentators supporting termination of the privilege argue that people care little about what happens after

[13] *See* our principal Brief at 23 n.25. *Cooper v. Oklahoma*, *supra*, cited the Oklahoma statute allowing the attorney to claim the privilege in sustaining exclusion from a criminal trial of a deceased client's statements.

[14] *See* ABA Ethics Committee Informal Opinion 1293 (confidences must be preserved following client's death). State and local bar opinions adopting the same rule are summarized in ABA/BNA, *Lawyers' Manual on Professional Conduct*, ¶¶ 801:4361 (Maryland), 801:1710 (LA County), 801:6609 (North Carolina), 901:1033 (Alabama), 901:2069 and 2070 (Connecticut), 90:5102 (Mississippi), 901:6265 (Nassau County), 901:8606 (Vermont), 901:9110 (Wisconsin), 1001:6001 (New Mexico), 1001:7313 (Pennsylvania). This Court has looked to bar pronouncements in determining reason and experience. *Upjohn*, *supra*, 449 U.S. at 390-91.

[15] We read Mueller and Kirkpatrick to contend that the privilege should be overcome posthumously to avoid "extreme injustice" both in civil and criminal cases. 2 Mueller & Kirkpatrick, *Federal Evidence*, § 199 at 380 & n.11 (2d ed. 1994).

they die—a view Independent Counsel does not defend;[16] and that some commentators (Wigmore and Frankel) agree that the case law represents sound policy, while others (Hazard and Hodes, Weinstein, Epstein, Rice) do not criticize the present rule. In addition, one commentator Independent Counsel cites is fundamentally antagonistic to the privilege and this Court's decisions applying it, making reliance on his views dubious at best.[17]

5. Independent Counsel contends that the cases offer little reasoning to support survival of the privilege after death. Br. 21. However, survival is so well-established that extended discussion may have been deemed unnecessary. Moreover, the only nontestamentary case supporting termination of the privilege at death is a *civil* case that—if the position advocated by Independent Counsel or the court of appeals is adopted—was wrongly decided. *Cohen v. Jenkintown Cab Company*, 357 A.2d 689, 692-94 (Pa. Super. Ct. 1976).

By contrast, a leading recent decision holding that the privilege survives death in a *criminal* case contains an extensive discussion supporting that conclusion. It explains that, in many instances, a contrary rule would "so deter the client from 'telling all' as to seriously impair the attorney's ability to function effectively," a result "inconsistent wtih the traditional value our society has assigned, in the interest of justice, to the right to counsel and to an effective attorney-client relationship." *In re John Doe*

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[16] *See* 24 Wright & Graham, *Federal Practice and Procedure*, 5498, at 484 (1986) (concern for posterity would be "Pharaoh-like"); Wolfram, *Modern Legal Ethics*, § 6.3.4 at 256 (1986) (concern over post-death disclosure would be "mythic").

[17] Professor Fischel believes that in *Upjohn* "[t]he Court got it exactly backwards." Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1, 29 (1998). He concludes that "the ethical duty of confidentiality, the attorney-client privilege, and the work product doctrine . . . are of dubious value to clients and society as a whole" and "[a]bsent some more compelling justification for their existence than has been advanced to date, these doctrines should be abolished." *Id.* at 33.

Grand Jury Investigation, 562 N.E.2d 69, 71 (Mass. 1990).

F. Independent Counsel cannot rely on possible defendant rights to enhance his ability to obtain evidence.

This case involves a prosecutor and grand jury's attempt to break the privilege and obtain evidence; it does not concern the rights of criminal defendants. Independent Counsel, however, asserts a principle of evidentiary neutrality, claiming that, if a defendant has a right to obtain exculpatory information despite a privilege, a grand jury has a similar right because it is empowered to command information that will protect the innocent. Br. 24-27. This effort to piggyback on possible defendant rights fails for several reasons.

First, there is no principle equalizing the rights of grand juries and defendants to obtain evidence. Defendants have a due process right to obtain material exculpatory evidence the government possesses. *Brady v. Maryland*, 373 U.S. 83 (1963). Prosecutors have no right to force inculpatory testimony from defendants, and Fed. R. Crim. P. 16(b)(2) further limits their pre-trial discovery rights. Defendants have a right to exclude evidence prosecutors obtained illegally; prosecutors have no comparable right to exclude defendants' evidence. 1 *McCormick on Evidence* (4th ed.), § 173 at 707-08; *Weinstein's Federal Evidence* (2d ed. 1997) § 512.05. Defendants have a special Sixth Amendment right to confront and cross-examine. Prosecutors, however, may obtain a court order immunizing a witness claiming the Fifth Amendment, an investigative technique defendants do not enjoy.

Moreover, criminal defendants have no general right to override valid privileges. The state criminal cases actually reaching the issue all have decided that the attorney-client privilege prevails over a defendant's rights to obtain evidence. More broadly, rules that " 'accommodate other legitimate interests in the criminal trial process' " override a defendant's right to present a defense unless those rules

are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *United States v. Scheffer*, 118 S.Ct. 1261, 1264 (1998), quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987).

It may be that, despite the transcendent interests the attorney-client privilege serves, some rare circumstance will arise where its application after the client's death would be unconstitutionally "arbitrary" or "disproportionate." *Compare Davis v. Alaska*, 415 U.S. 308 (1974). But the Court need not and should not decide that issue here.[18] Here, Independent Counsel claims that the grand jury is entitled to obtain privileged material *whenever it is relevant*, without attempting to demonstrate that anyone would be arbitrarily or disproportionately harmed by denying disclosure. Br. 41 n.40.[19] Even under the most liberal

[18] *Upjohn, supra*, 449 U.S. at 396; *Jaffee v. Redmond*, 508 U.S. 1, 18 (1996).

We note that courts often have found ways to do justice without violating the attorney-client privilege. Various courts have refused, on conflict-of-interest grounds, to allow a husband accused of murdering his wife to assert her privilege to exclude evidence potentially harmful to him. *Arizona v. Gause*, 489 P.2d 830 (Ariz. 1971), *vacated on other grounds*, 409 U.S. 815 (1972); *Wyoming v. Kump*, 301 P.2d 808 (Wyo. 1956); *District Attorney v. Magraw*, 628 N.E.2d 24 (Mass. 1994). In *Magraw* a probate court, at the district attorney's behest, removed the husband as executor and appointed another, thereby negating his ability to assert the privilege. In *Arizona v. Macumber*, 544 P.2d 1084 (Ariz. 1976), the exemplar case for those asserting that maintaining the privilege after death can produce untoward results, the Arizona Supreme Court reversed the conviction on another ground. Then, on remand, the privilege appropriately was waived. However, the attorney evidence eventually was deemed untrustworthy and not admitted. *Arizona v. Macumber*, 582 P.2d 162 (Ariz. 1978). That result was not surprising; allegations that someone since dead admitted the crime—"someone who will neither contest the allegations nor suffer punishment as a result of them"—are "not uncommon" and "are to be treated with a fair degree of skepticism." *Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring).

[19] A prosecutor's determination of relevance is virtually impossible to contest in the grand jury context. A person challenging a grand jury subpoena on relevance grounds must show "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991).

interpretation of a defendant's constitutional rights, a defendant would not be entitled to pretrial discovery of any privileged material defense counsel might think relevant.[20]

II. WORK PRODUCT.

A. The client's death does not terminate the work product privilege, which also belongs to the attorney.

Independent Counsel argues that the work product doctrine exists only for the benefit of the client and therefore must expire with the client's death. Br. 46-47. This argument is flatly wrong and is contrary to the very case Independent Counsel cites for it. *Moody v. IRS*, 654 F.2d 795, 800 (D.C. Cir. 1981)

Moody held that the work product privilege "creates a legally protectable interest in non-disclosure in two parties: lawyer and client," and that the "lawyer has standing to protect 'confidentiality necessary to proper preparation of a case . . .'; that is, that degree of privacy necessary to function as an effective advocate." *Moody v. IRS, supra*, 654 F.2d at 801 and n.22 (citation omitted). Even the court of appeals in the immediate case recognized that the work product privilege protects " 'a complex of individual interests particular to attorneys that their clients may not share.' " Pet. App. 11a, quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).[21]

[20] The recent decisions limiting the attorney-client privilege for governmental attorneys do not affect this case. Both make clear that they do not apply to government employees seeking advice from private attorneys. *In re Grand Jury Proceedings*, D.D.C. May 27, 1998 (Misc. Nos. 98-095, 98-096 & 98-097 (NHJ)), slip op. 22-27; *In re Grand Jury Subpoena*, 112 F.3d 910, 921 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997).

[21] Other cases holding that the work product privilege belongs to the lawyers involved include *In re Special September 1978 Grand*

Here the work product privilege belongs to two persons—Mr. Foster and Mr. Hamilton. Unfortunately, Mr. Foster is not here personally to assert it, but Mr. Hamilton is and does. Independent Counsel's argument in this regard, made but not adopted below, is untenable.

B. There is no basis for reversing the district court's finding that the notes reflect the attorney's mental impressions; the grand jury's need does not outweigh the privilege.

Alternatively, Independent Counsel asks this Court to determine that Mr. Foster's death created a sufficient need to overcome the work product privilege with respect to factual portions of the notes. Br. 47-48. Independent Counsel ignores the district court's finding that "the need of the grand jury does not outweigh the privileges asserted." Pet. App. 52a. He does not attempt to defend the court of appeals' basis for reversing that finding—*i.e.*, the erroneous conclusive presumption that lawyers do not exercise professional judgment in taking notes at initial client interviews.

There is not, as Independent Counsel contends (Br. 47), a "settled rule" allowing disclosure in the circumstances at hand. Rather, under the district court's finding that the notes "reflect the mental impressions of the lawyer" (Pet. App. 52a), the notes are entitled to "the super-protective envelope reserved by Rule 26(b)(3) for 'mental impressions' " (Pet. App. 13a-14a), and may not be produced using the ordinary standard of need applied by the court of appeals. The district court's finding is supported by the record and by common sense—an attorney simply cannot take three pages of notes during a two-hour interview without exercising professional selectivity. Redaction of the notes to eliminate explicit expressions of opinion would not protect the lawyer's exercise of his professional judgment in selecting what information to record.[22]

Jury, 640 F.2d 49, 63 (7th Cir. 1980) (lawyer may assert privilege to protect opinion work product, even though client could not do so because of participation in fraud); *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994). *See* Larkin, *Federal Testimonial Privileges*, § 11.03 at 11-53 (1998) ("The principal possessor of the right to invoke the benefits of the [work product] doctrine is the attorney or agent who prepared the materials in anticipation of litigation or for trial.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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June 1, 1998

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[22] Independent Counsel cites two decisions in which courts have required production of attorney notes of witness interviews. *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) (decided before *Upjohn*). Both cases, however, recognized that attorney notes reflecting mental processes enjoy heightened protection and did not allow disclosure of attorney thought processes. The descriptions of the notes involved in those cases demonstrate that they did not resemble the highly fragmented, selective notes Mr. Hamilton took. *See* 675 F.2d at 487 (notes were "recitations of [witness'] statements"); 599 F.2d at 1231-32 (interview notes were embodied in "memoranda" containing "factual recitation.")

Independent Counsel also cites Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 354 (1997), for the proposition that a witness' death is usually sufficient to require production of work product materials. That statement, however, was directed at ordinary work product, not opinion work product such as involved here.

No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the attorney-client privilege in federal criminal proceedings applies to the same extent when the client is deceased as it does when the client is alive.

2. Whether the work product doctrine applies in federal criminal proceedings when the client for whom the work was performed is deceased and the work product consists of notes of an interview with the deceased client.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 124 F.3d 230. The order of the court of appeals denying the suggestion for rehearing in banc (Pet. App. 27a-32a) is reported at 129 F.3d 637. The opinions of the district court (Pet. App. 33a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1997. The court of appeals denied a petition for rehearing and suggestion for rehearing in banc on November 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Grand Jury Clause of the Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

Rule 501 of the Federal Rules of Evidence provides in relevant part: "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

STATEMENT

Federal grand jury subpoenas were issued to petitioners for notes of a July 11, 1993, conversation between petitioner James Hamilton and his client, Vincent W. Foster, Jr., who is now deceased. Without elaboration, the district court concluded that the attorney-client privilege and work product doctrine protected the notes. The court of appeals reversed. Because the client was deceased, the court held that the attorney-client privilege did not bar production. The court also concluded that, under the facts of this case, the work product protection did not apply.

1. a. Vincent W. Foster, Jr., assumed office as Deputy White House Counsel on January 20, 1993. Before that date, Mr. Foster had been an attorney at the Rose Law Firm in Little Rock, Arkansas. At the Rose firm, he was

a partner and friend of Hillary Rodham Clinton, Webster L. Hubbell, and William H. Kennedy.

On May 19, 1993, David Watkins, Assistant to the President for Management and Administration, discharged seven career employees of the White House Travel Office. White House spokesperson Dee Dee Myers announced that the FBI was conducting a criminal inquiry into the activities of the fired employees.[1]

The dismissal of the Travel Office employees produced an immediate controversy about why the employees had been fired and why the White House had involved the FBI in the matter. Thereafter, the White House offered five of the employees reinstatement to government employment. The White House further responded by conducting an internal investigation into the firings. On July 2, 1993, the White House issued a public report of that investigation. Chief of Staff Thomas F. McLarty reprimanded four White House officers and employees (including David Watkins and Associate Counsel William Kennedy) for their actions in connection with the firings. Although Mr. Foster was not reprimanded, the White House report recounted his apparent role in the events leading to the firings.

Controversy over the Travel Office firings did not abate with the White House's report and the publicly announced reprimands. On July 2, 1993, the President signed the Supplemental Appropriations Act of 1993, Pub. L. No. 103-50, which required the General Accounting Office to conduct a review of the firings. At the same time, calls were issued for further congressional or federal law enforcement investigation into the matter.

b. On Sunday, July 11, 1993, Mr. Foster met with petitioner James Hamilton, an attorney at Swidler & Berlin

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[1] The basic facts of the Travel Office matter are described in a variety of agency and congressional reports. See H.R. Rep. No. 104-849 (Sept. 26, 1996); GAO, *White House Travel Office Operations* (May 2, 1994); White House, *White House Travel Office Management Review* (July 2, 1993).

(also a petitioner). Mr. Hamilton had provided legal assistance to the 1992 Clinton Campaign, had served as one of four Counsel to the Clinton-Gore Transition, and had assisted Mr. Foster in the process of selecting nominees. The July 11 conversation between Mr. Foster and Mr. Hamilton related to Mr. Hamilton's legal representation of Mr. Foster and the White House concerning possible congressional or other investigations. J.A. 5. Mr. Hamilton took notes during the meeting. *Ibid.* Those notes are the subject of the grand jury subpoenas at issue here.

On July 20, 1993, nine days after the Foster-Hamilton meeting, police and medical personnel were called to Fort Marcy Park, Virginia. They found Mr. Foster dead with a gun in his hand and a gunshot wound to the head. The United States Park Police conducted an investigation of the death and concluded three weeks later that Mr. Foster had committed suicide by gunshot in Fort Marcy Park (a conclusion confirmed by subsequent investigations).

The events surrounding the Travel Office firings were investigated by the GAO, the Office of Professional Responsibility of the Department of Justice, and the Committee on Government Reform and Oversight of the United States House of Representatives. All three entities produced extensive reports on the matter.

c. On January 3, 1996, after the conclusion of several investigations into the Travel Office firings (and while an investigation by the House of Representatives was ongoing), the White House reported that it had uncovered a memorandum written by David Watkins in the fall of 1993. The White House indicated that a White House attorney discovered the memorandum while searching the stored files of an aide who had worked for Mr. Watkins.

Mr. Watkins' 1993 memorandum suggested that Mrs. Clinton may have played a role in the events leading to the Travel Office firings. It stated: "[T]he First Lady took interest in having the Travel Office situation resolved quickly . . . . Foster regularly informed me that the First

Lady was concerned and desired action—the action desired was the firing of the Travel Office." H.R. Rep. No. 104-849, at 41. The memorandum thus raised questions whether prior testimony of Mr. Watkins (and others) about Mrs. Clinton's role in the Travel Office matter had been truthful.

In March 1996, based in large part on the Watkins memorandum, Attorney General Reno requested the Special Division of the United States Court of Appeals for the District of Columbia Circuit to expand the jurisdiction of the Office of Independent Counsel (OIC) to investigate whether Mr. Watkins—or other individuals—made false statements, committed perjury, obstructed justice, or committed other crimes during investigations of the Travel Office matter. See 28 U.S.C. 593(c). The Special Division thereafter granted the OIC jurisdiction to conduct that investigation and all related matters. See 28 U.S.C. 593(b)(3).[2]

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[2] By way of background: On August 5, 1994, the Special Division, at Attorney General Reno's request, appointed the Independent Counsel to investigate and prosecute crimes "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *In re Madison Guaranty Savings & Loan Ass'n*, Order at 1-2 (D.C. Cir. Spec. Div. Aug. 5, 1994).

This appointment arose out of a series of events. In October 1993, the Department of Justice received nine criminal referrals from the Resolution Trust Corporation. The criminal referrals listed as subjects James B. McDougal, the former owner of Madison Guaranty Savings & Loan Association in Little Rock; his wife, Susan H. McDougal; and Jim Guy Tucker, who had succeeded President Clinton as Governor of Arkansas and previously had been a Little Rock businessman. The referrals listed the Clintons as witnesses. Mrs. Clinton had represented Madison Guaranty as an attorney at the Rose Law Firm in the mid-1980s. The McDougals and the Clintons had together owned the Whitewater Development Corporation, a real estate development company, from 1978 to December 1992. Also in the fall of 1993, Little Rock businessman and former Judge David L. Hale stated that in 1986 he

The OIC thereupon began an intensive investigation of the facts and circumstances with respect to the Travel Office matter. Mr. Foster would have been a significant witness in the investigation: He had talked to Mr. Watkins about the Travel Office prior to the firings, and he was one of only a handful of persons known to have talked with Mrs. Clinton about the matter. If alive, Mr. Foster would have been in a position to provide valuable information, whether inculpatory or exculpatory. In light of Mr. Foster's death, the communications from Mr. Foster to Mr. Hamilton on July 11, 1993, would be important in understanding Mr. Foster's role in the Travel Office events and in understanding the roles of others—and thus in determining whether individuals made false statements, committed perjury, obstructed justice, or committed other federal crimes.

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had discussed with then-Governor Clinton a fraudulent loan of $300,000 from Capital Management Services, Mr. Hale's small business investment corporation, to Master Marketing, a fictitious "company" owned by Susan McDougal. Portions of that $300,000 subsequently were used for the benefit of the Whitewater Development Corporation.

In December 1993, it was publicly revealed that documents related to the Whitewater corporation had been in the White House office of Mr. Foster at the time of his death and had not been reviewed by Justice Department attorneys who had sought (but not been allowed) to review all of Mr. Foster's documents the day after his death. Mr. Foster had served as attorney for the Clintons for the 1992 transfer of the Clintons' interest in Whitewater to James McDougal. Mr. Foster also was involved in overseeing the preparation of the Clintons' tax returns in April 1993, on which they addressed the Whitewater investment. During the 1992 campaign, Mr. Foster and Webster Hubbell had assisted Mrs. Clinton in answering media inquiries about Mrs. Clinton's legal work, including for Madison.

During the OIC's ensuing investigation of these and other matters, fourteen individuals have been convicted of federal crimes. They include Jim Guy Tucker, James McDougal, Susan McDougal, David Hale, and Webster L. Hubbell, the former Associate Attorney General of the United States and a former law partner of Mrs. Clinton and Mr. Foster.

2. a. On December 4, 1995, federal grand jury subpoenas were issued to petitioners for, among other things, Mr. Hamilton's notes of his July 11, 1993, meeting with Mr. Foster. Petitioners filed a motion to quash, arguing that the notes were protected by the attorney-client privilege and work product doctrine.[3]

On December 16, 1996, the district court (Judge John Garrett Penn) denied enforcement of the subpoena for the July 11 notes, holding without elaboration or explanation that the notes were covered by the attorney-client privilege and the work product doctrine.

b. The court of appeals (Judge Williams, joined by Judge Wald) reversed and remanded. The court noted that in the vast majority of cases to have addressed the issue—particularly decisions concerning a testator's intent in a will dispute—courts have held that the attorney-client privilege does not apply after the death of the client. Pet. App. 3a. The court also emphasized that virtually all commentators have "supported some measure of post-death curtailment" of the privilege. *Id.* at 4a (referring to scholars such as McCormick, Wright and Graham, Mueller and Kirkpatrick, and Judge Learned Hand). The court further pointed out that the American Law Institute (ALI), in the 1996 Proposed Final Draft of the Restatement (Third) of the Law Governing Lawyers, concluded that the privilege should not apply after the death of the client. *Id.* at 5a.

Turning to policy, the court stated: "The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information; indeed, his availability has been conventionally

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[3] The subpoenas were initially issued during the OIC's grand jury investigation into activities connected to Mr. Foster's death and the aftermath. The OIC subsequently received jurisdiction to investigate the Travel Office matter in March 1996, and the July 11 notes are likewise relevant and important to that aspect of the OIC's grand jury investigation.

invoked as an explanation of why the privilege only slightly impairs access to truth." *Id.* at 7a. The court further stated that there would be little if any additional chilling effect caused by curtailing the privilege after death. Criminal liability will have ceased altogether, so the decedent's legal interests could not be harmed in any way by disclosure in federal criminal proceedings after death. *Id.* at 6a-8a.

With respect to the work product issue, the court distinguished factual information contained in an attorney's notes of an interview from the attorney's own evaluations in cases where need has been shown. The court stated that "[o]ur brief review of the documents reveals portions containing factual material . . . ." *Id.* at 14a.

Judge Tatel dissented on the attorney-client privilege issue.

SUMMARY OF ARGUMENT

The court of appeals, the vast majority of judicial decisions, virtually all leading commentators, and the American Law Institute have properly concluded that the attorney-client privilege should not apply when the client is deceased.

In the courts, the issue has almost always arisen in will-contest disputes among the testator's heirs or devisees. In those cases, courts uniformly have held that the attorney-client privilege does not apply after the death of the client. These testamentary cases reflect a settled policy judgment: The interest in settling estates outweighs any interest in the posthumous confidentiality of attorney-client communications. That reasoning applies with even greater force in a criminal investigation, where the need for relevant evidence is at its apex. Applying the privilege after death in criminal proceedings, but not in will contests, would create an irrational asymmetry in the law.

The client's legal interests are not adversely affected by a rule that the privilege does not apply after death in

criminal proceedings. All possibility of criminal liability has ceased at death. In addition, the decedent's estate cannot be harmed by disclosure of the information in criminal proceedings. Petitioners point extensively to harms to reputation and to other persons. But the flaw in that argument is that the decedent's attorney would disclose the same factual information that the client would have disclosed were he or she alive. An interest in reputation, or in protecting others, does not justify nondisclosure of information before or after death.

On the other hand, application of the privilege after the client's death hinders the truthseeking process far more than application of the privilege while the client is living. The client is no longer available to be asked what he knows. For that reason, as the court of appeals explained, the "costs of protecting communications after death are high." Pet. App. 7a.

Petitioners contend that candid communications would be chilled by a rule that the privilege does not apply after death. That is not true for the client who plans to invoke the Fifth Amendment or testify truthfully. Only the client who otherwise is planning to perjure himself would be less candid with his attorney because of a rule that the privilege does not apply after death.

Even assuming that there is a chilling effect, it would be marginal. And marginal chilling effects, the law has established, do not outweigh the grand jury's need for relevant evidence.

ARGUMENT

I. THE ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY IN FEDERAL CRIMINAL PROCEEDINGS WHEN THE CLIENT IS DECEASED.

A. Privileges are strictly construed, for they are in derogation of the search for truth.

We are not aware of any other reported federal case addressing whether the attorney-client privilege applies in

criminal proceedings when the client is deceased.[4] Analysis thus begins with bedrock principles that guide judicial analysis of privilege claims.

Rule 501 of the Federal Rules of Evidence provides that "[t]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See *Wolfle* v. *United States*, 291 U.S. 7, 12 (1934) (establishing common-law standard). The Rule is to be "construed . . . to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. In light of its truthseeking role, the Court is "disinclined to exercise [its Rule 501] authority expansively." *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 189 (1990). To the contrary, "[c]ourts have historically been cautious about privileges." *United States* v. *Nixon*, 418 U.S. 683, 710 n.18 (1974). The primary rationale underlying the caution is straightforward: "[P]rivileges obstruct the search for truth," *Branzburg* v. *Hayes*, 408 U.S. 665, 690 n.29 (1972), and "contravene the fundamental principle that the public has a right to every [person's] evidence," *University of Pennsylvania*, 493 U.S. at 189 (quotation omitted).

The principles applied by this Court are consistent with the paramount goal of truthseeking: Privileges "are not lightly created," *Nixon*, 418 U.S. at 710, and "must be strictly construed," *University of Pennsylvania*, 493 U.S. at 189 (quotation omitted).[5] A privilege applies only where it is "necessary to achieve its purpose," *Fisher* v. *United States*, 425 U.S. 391, 403 (1976), and "promotes

[4] This case in no way affects the ethical rules governing attorneys. Those rules restrict an attorney's *voluntary* disclosure of information, including information not covered by the attorney-client privilege. See ABA Model Rule of Professional Conduct 1.6.

[5] The "manifest destiny of evidence law is a progressive lowering of the barriers to truth." C. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Tex. L. Rev. 447, 469 (1938).

sufficiently important interests to outweigh the need for probative evidence," *Jaffee* v. *Redmond*, 518 U.S. 1, 9-10 (1996). And "the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege." *Branzburg*, 408 U.S. at 682 n.21 (quotation omitted).[6]

Context also counts. This Court has specifically recognized that *criminal* matters pose an especially compelling need for relevant evidence. The "longstanding principle that the public has a right to every [person's] evidence . . . is particularly applicable to grand jury proceedings." *Branzburg*, 408 U.S. at 688. The Court has indicated that several privileges do *not* apply in criminal proceedings although they may apply in civil proceedings. *Id.* at 686-701; *Nixon*, 418 U.S. at 712 n.19; cf. 1 *McCormick on Evidence* § 104, at 388 (4th ed. 1992) (some States deny physician-patient privilege "in criminal cases generally, or in felony cases, or in cases of homicide"); H.R. 2676, 105th Cong. (1997) (providing for limited accountant-client privilege in "noncriminal proceedings" in federal courts).

Not only do privileges obstruct the search for truth, federal courts lack clear guideposts for deciding whether to recognize one proposed privilege or another. Indeed, determining their relative effects on the truthseeking process is a "stupefying complex task." F. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup. Ct. Rev. 309, 361. For these reasons, this Court has recognized privileges and defined their scope only to the extent established by the common law or in the States—and only to the extent that they serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jaffee*, 518 U.S. at 9

[6] See 8 J. Wigmore, *Evidence* § 2290, at 543 (McNaughton rev. 1961) ("[T]he judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy.").

(quotation omitted); see *University of Pennsylvania*, 493 U.S. at 188-195; *Trammel* v. *United States*, 445 U.S. 40, 47-53 (1980); *United States* v. *Gillock*, 445 U.S. 360, 366-368 (1980). Beyond this narrow category, "[t]he balancing of conflicting interests of this type is particularly a legislative function." *University of Pennsylvania*, 493 U.S. at 189.

These principles of restraint and deference combine, in practical effect, to create a strong presumption that federal courts should apply a privilege (i) no more broadly than the law (decisional or statutory) has established and (ii) no more broadly than necessary to serve a public good. Petitioners' privilege claim satisfies neither requirement.

B. Virtually all leading commentators agree that the attorney-client privilege should not apply after the death of the client.

The attorney-client privilege, as applied in federal courts, has emerged from the balancing of the public's need for relevant information in legal proceedings against the client's need to communicate with his or her attorney to secure effective legal representation. See *United States* v. *Zolin*, 491 U.S. 554, 562 (1989); see also *Upjohn Co.* v. *United States*, 449 U.S. 383, 389-390 (1981) (corporate client). The privilege excludes relevant and reliable information, however, and thus "is not without its costs." *Zolin*, 491 U.S. at 562.[7] As with other exclusionary rules, therefore, the attorney-client privilege is carefully confined and applied only in circumstances where it is "necessary" to serve its purpose. *Fisher*, 425 U.S. at 403.

[7] These costs led Wigmore to state that the privilege is "an obstacle to the investigation of the truth"—the benefits of which are "all indirect and speculative" while the "obstruction is plain and concrete." Wigmore § 2291, at 554. Professor Fischel recently has argued that "[t]he legal profession, not clients or society as a whole, is the primary beneficiary" of the privilege. D. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1, 3 (1998).

Numerous exceptions and qualifications have developed to cabin the privilege's effects. It does not apply, for example, to client communications seeking business or political or personal advice. See *McCormick* § 88, at 322-324. The privilege is overridden when client and attorney become embroiled in a dispute. See S. Stone & R. Taylor, *Testimonial Privileges* § 1.66, at 1-177 to 1-179 (1997). It generally does not apply to attorney fee information. See Restatement § 119 cmt. g. The privilege does not cover communications made in furtherance of a client's crime or fraud. See *Zolin*, 491 U.S. at 562-563. Indeed, ethical rules prohibit an attorney from allowing a client to commit perjury, notwithstanding the breach of attorney-client confidentiality and the correspondingly "grave consequences" that may ensue for the client. ABA Model Rule of Professional Conduct 3.3 & cmt.; see *Nix* v. *Whiteside*, 475 U.S. 157, 166-176 (1986).[8] In light of these many limitations and exceptions, petitioners' sweeping broadside that a lawyer can and should be able to give his or her client "an *unqualified* assurance of confidentiality," Pet. Br. 11 (emphasis added), reflects a serious misapprehension of existing law. That body of law is richly textured and far more nuanced and sensitive to truthseeking values than the monolithic absolutism championed by petitioners.[9]

[8] In addition, the attorney-client privilege, like all common-law privileges recognized under Rule 501, is an *ex post* rule of admissibility in federal court proceedings, not a constitutionally mandated *ex ante* guarantee of confidentiality. The scope of evidentiary privileges can vary widely among the 50 States (each governed by its own statutory and common law), the federal courts (governed by Rule 501), Congress (governed by its own rules), and state and federal agencies. A communication is not privileged in all fora merely because it is privileged in one forum. A federal common-law privilege thus cannot guarantee confidentiality in all fora at all times, no matter how broadly or absolutely it is defined.

[9] "[P]redictability in the application of the privilege . . . is largely lacking in many areas," *McCormick* § 87, at 317; as an ABA publication acknowledges, "the privilege does not have the reach

Accordingly, the precise question at hand is how *broadly* the Court should fashion the attorney-client privilege—in particular, whether it should retain its full force in a grand jury investigation after the death of the client. Almost all of the leading commentators who have devoted thoughtful attention to this issue have concluded that the privilege should *not* apply after death, particularly in criminal proceedings where the need for relevant evidence is at its zenith. This virtual consensus among leading commentators provides a persuasive indicator of "reason," see Fed. R. Evid. 501, and of the proper rule in the federal courts. See, *e.g.*, *Trammel*, 445 U.S. at 50 (narrowing scope of spousal privilege relying in part on fact that "[s]cholarly criticism of the *Hawkins* rule has . . . continued unabated"); *Hawkins* v. *United States*, 358 U.S. 74, 81 (1958) (Stewart, J., concurring) (rule "criticized" by scholars, among others, warrants "most careful scrutiny").

We briefly chronicle the foremost examples:

• The American Law Institute, in the 1996 Proposed Final Draft of the Restatement of the Law Governing Lawyers, concludes that the privilege should *not* apply after death. To the contrary, under the ALI's approach, the tribunal should be "empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. . . . Permitting such disclosure would do little to inhibit clients from confiding in their lawyers." Restatement (Third) of the Law Governing Lawyers § 127 cmt. d (Proposed Final Draft Mar. 29, 1996).[10]

• Dean McCormick, on whom this Court and the Advisory Committee on the Rules of Evidence have often relied, states that the privilege should not apply after

many lawyers believe it has." E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 453 (1997).

[10] We are informed that the ALI membership has now approved the proposed draft of the Restatement of the Law Governing Lawyers.

death. "[T]o hold that in all cases death terminates the privilege . . . could not to any substantial degree lessen the encouragement for free disclosure which is the purpose of the privilege." *McCormick* § 94, at 350.

• Professors Mueller and Kirkpatrick argue that the privilege should not survive death in criminal investigations and criminal proceedings. "A rule requiring occasional disclosure in this setting would not seriously undercut the utilitarian basis of the privilege." 2 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 199, at 380 (2d ed. 1994). A contrary rule, they conclude, could lead to "extreme injustice"—for example, "if a deceased client has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences." *Ibid.*

• Professors Wright and Graham likewise maintain that the privilege should not apply after death. They argue that attorney-client communications would not be meaningfully affected, yet "imposing the privilege after the death will often result in a loss of crucial information because the client is no longer available to be asked what he knows." Wright & Graham § 5498, at 484. Wright and Graham pointedly note: "Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy." *Ibid.*

• Professor Wolfram relates McCormick's conclusion that the law should "provide generally that death ends the privilege in all cases." C. Wolfram, *Modern Legal Ethics* § 6.3.4, at 256 (1986). According to Wolfram, if the privilege is to terminate at death in will-contest cases (which it does), logic requires that the privilege terminate at death in all cases.

• Judge Learned Hand, during ALI debates in 1942, suggested that the privilege should not survive death. He stated that a communicant who dies "can have no more interests except in a remote way" and thus the ALI should consider that the privilege "die altogether with the communicant." 19 ALI Proceedings 143-144 (1942).

• Consistent with overwhelming scholarly authority, the court of appeals majority in this case—Judge Wald and Judge Williams—concluded that the privilege should not survive death in federal criminal proceedings.[11]

C. In the vast majority of cases in which the issue has arisen, courts have not applied the attorney-client privilege after the death of the client.

1. The question whether the privilege applies after the death of the client has arisen most often in will-contest disputes among the testator's heirs or devisees. According to an exhaustive study, roughly 380 of the 400 or so reported cases (95%) fall within this category of "testamentary" cases. See Simon Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Legal Ethics 45, 58 n.65 (1992).[12] In those cases, courts consistently have held that the attorney-client privilege does *not* apply after death of the client. Indeed, this Court

[11] As Wright and Graham note, "Wigmore is the only one of the major figures in evidence scholarship who did not favor ending the privilege with the death of the client." § 5498, at 484-485. Wigmore's view as to criminal proceedings is not clear, however. In his fleeting references to the posthumous privilege issue, Wigmore seems to have referred only to the two most prevalent kinds of cases where the issue arises: testamentary cases, where Wigmore says the privilege should not apply after death, § 2314, at 611-616, and cases in which the estate is a party in civil litigation against an outsider, where the information could be used to "the detriment" of the estate and where Wigmore says the privilege thus should apply, § 2323, at 630. But the privilege issue also can arise in criminal (and civil) cases after the client's death where the estate is *not* a party in the litigation, and the information is sought from the decedent's attorney as a third-party witness. In such cases, the information will not be used to the detriment of the estate. Wigmore does not separately analyze that situation, and it is thus unclear whether he would have concluded that the privilege should apply in those cases. In short, we caution against overreading Wigmore.

[12] This survey examined "essentially every case found where the client was dead and the operation of the attorney-client privilege was an issue." 6 Geo. J. Legal Ethics at 58 n.65.

long ago rejected application of the privilege after death in such a case, stating that "in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged." *Glover* v. *Patten*, 165 U.S. 394, 406 (1897).

By virtue of the rule established in these testamentary cases, operation of the attorney-client privilege "has in effect been nullified in the class of cases where it would most often be asserted after death." *McCormick* § 94, at 348; see also Wright & Graham § 5498, at 483-484 ("[I]n the one instance in which the issue was most likely to arise—where the client had died and information was sought from his surviving attorney about the client's estate —courts manipulated the privilege . . . so as to make the attorney's testimony available in disputes over succession to the client's property."). The testamentary rule reflects a longstanding policy judgment that the interest in accurately settling estates trumps the client's interest in confidentiality (or even the client's expectation of confidentiality).[13]

The testamentary rule is important, if not decisive, in assessing the appropriate rule for criminal cases. The public's need for determining whether a crime has been committed (and if so, by whom) warrants at least parity of treatment to that afforded the interest in resolving will contests with precise accuracy. *If "who gets Blackacre" is sufficient to trump the privilege after the client's death, then questions raised in the criminal process —who gets indicted, who gets convicted, who gets punished—are surely sufficient to trump the privilege after the client's death.* "[O]ur historic commitment to the rule of

[13] Inasmuch as testamentary cases represent the vast majority of cases in which the general issue of the posthumous privilege arises, and given the established rule in those cases, petitioners' blanket claim that the "overwhelming majority of decided cases supports the conclusion that the attorney-client privilege survives the client's death," Pet. Br. 19, is wrong.

law" is *"nowhere* more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." *Nixon,* 418 U.S. at 708-709 (quotation omitted) (emphasis added). The longstanding principle that the public has a right to every person's evidence is thus "*particularly applicable* to grand jury proceedings." *Branzburg,* 408 U.S. at 688 (emphasis added). The testamentary rule suggests, *a fortiorari,* that a comparable rule should govern in federal criminal proceedings.

The testamentary rule further illuminates the issue at hand, inasmuch as it requires disclosure of sensitive and confidential communications to one's attorney about family members, friends, and associates. Those communications may reveal why particular individuals received specific bequests from the testator's estate and why others did not. Courts have recognized that "[e]state planning is an extremely personal and private endeavor and may be based on considerations one would prefer never to reveal." *Hitt* v. *Stephens,* 675 N.E.2d 275, 279 (Ill. App. 1997). The court of appeals noted that "a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed." Pet. App. 9a. In *Glover,* this Court identified a situation where the attorney "might testify as to what was said by the testator about the character of the children and his relations to their mother"—exquisitely private and sensitive communications, yet required to be disclosed pursuant to the testamentary rule. 165 U.S. at 408. As a general matter, therefore, the communications disclosed by operation of the testamentary rule likely are at least as private as the communications that might be disclosed in criminal investigations.[14]

[14] As a result, as one commentator perceptively has stated, the will-contest situation is "the one occasion *above all others* when a client is likely to be moved to silence in conversations with a lawyer if the client becomes aware that disclosures can be made after the client's death." Wolfram § 6.3.4, at 256 (emphasis added). If clients ever were to be chilled by the thought of post-death disclosure, it would occur when "the disparaging words they uttered about their heirs to their attorneys, but which they carefully excluded from their last wills, would nonetheless be revealed to all during probate hearings." B. Hood, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client,* 7 Geo. J. Legal Ethics 741, 767 n.156 (1994).

The testamentary rule thus applies even though disclosure of the decedent's attorney-client communications may adversely affect (i) the reputational interests of the decedent and (ii) the reputational (or legal) interests of persons whom the decedent cares about.

Petitioners strive mightily to avoid the import of the testamentary rule. They contend that clients intend that their attorney-client communications be disclosed. "[I]t is fair to presume," petitioners opine, that a client "would have wanted his or her testamentary intent fulfilled, *even at the cost of an embarrassing disclosure."* Pet. Br. 28 (emphasis added). But as the court of appeals rightly concluded, the testamentary rule does not "track" this notion of intent. Pet. App. 9a. It seems just as likely that some testators intend the sometimes elaborately memorialized documents to guide post-mortem disputes. Some clients might well conclude that settling their estates with precise accuracy is scarcely worth the cost of "an embarrassing disclosure"; others may think that accuracy is the paramount virtue worth whatever reputational cost is wrought. But that is ultimately neither here nor there: Courts compel disclosure in either event; indeed, they compel disclosure even if the personal representative opposes disclosure. Restatement § 131 cmt. b.

What is more, if it is "fair to presume that the client would have wanted his or her testamentary intent fulfilled, even at the cost of an embarrassing disclosure," Pet. Br. 28, then it is also "fair to presume" that the client would have wanted to provide relevant information to the grand jury. After all, the "sacrifice" caused by providing information to the grand jury is "a part of the necessary contri-

bution of the individual to the welfare of the public," *United States* v. *Dionisio*, 410 U.S. 1, 10 (1973) (quotation omitted), and has "long been recognized as a basic obligation that every citizen owes his Government," *United States* v. *Calandra*, 414 U.S. 338, 345 (1974).[15] In a criminal investigation, the client with relevant information would testify truthfully before the grand jury and tell all he knows.[16] After death, the attorney would simply disclose the factual information that the client himself would have disclosed were he alive.[17]

In all events, regardless of the shorthand employed,[18] the testamentary rule reflects a settled policy judgment that the interest in accurately settling estates overrides any interest in posthumous confidentiality of attorney-client communications. The rule petitioners propose—that the privilege applies, in perpetuity, in criminal proceedings after the client's death—would create a dramatic and irrational inconsistency with the rule that the privilege is

[15] Even on the facts here, as Judge Williams pointedly noted at oral argument, Tr. 29-30, it is unclear why petitioners assume that Mr. Foster would have wanted the truth about the Travel Office to be concealed, or why the law should credit such an intent, in any event. The interest in truth is especially strong when the underlying events concern public business.

[16] If a client asserted the Fifth Amendment privilege, he could be granted immunity and required to testify truthfully. See 18 U.S.C. 6002, 6003.

[17] By contrast, the testator is not required to testify and disclose the reasons underlying his intended property distribution. In a will contest, the attorney, in relaying his client's statements and intent, discloses what otherwise would *not* have been disclosed. That further demonstrates that the intrusion caused by the testamentary rule *exceeds* that caused by terminating the privilege at death in criminal investigations.

[18] Some have suggested that the privilege does not apply in testamentary cases because the identity of the privilege holder is in dispute during the will contest. Most codes now provide that the executor or administrator, not an heir, holds the privilege in civil cases where the estate is a party; this theory thus is inaccurate.

inapplicable in will-contest cases after the client's death. Neither reason nor experience justifies such a jurisprudential oddity.

2. Outside the testamentary context, cases actually *deciding* the issue of a posthumous attorney-client privilege are quite rare. A comprehensive survey found only about 20 such reported cases. See 6 Geo. J. Legal Ethics at 58 n.65. It is even more rare to unearth any legal analysis of the issue: "Rarely do courts elaborate at all on why the rule is or should be so. An exhaustive examination of the cases . . . found only a few judicial opinions offering any extensive discussion of whether or not the privilege should outlive the client." *Id.* at 57 & n.63. As the court of appeals pointed out, "such cases as do actually apply it give little revelation of whatever reasoning may have explained the outcome." Pet. App. 3a. "Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy." Wright & Graham § 5498, at 484.

Civil cases outside the testamentary context fall into two categories. In the first, the estate is *not* a party to the litigation; instead, one of the parties to a lawsuit seeks information from the decedent's attorney. In the second, the estate is a party in litigation, and the opposing party seeks information from the decedent's attorney.

As to the former category, we are aware of only *one* decision that sets forth any analysis. See *Cohen* v. *Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976). There, the court concluded that the privilege did not survive death. The *Cohen* court pointed out that (i) the estate was not involved in the suit, (ii) the decedent was not subject to liability, and (iii) the decedent's statements to his attorney could be quite important in the litigation. *Id.* at 692-694.[19]

[19] Petitioners deride the decision as that of a "mid-level state appellate court," Pet. Br. 20, but the case contains far more analysis

In contrast, when the estate *is* a party in a (non-will-contest) civil lawsuit—such as an alleged tort or breach of contract by the decedent—different interests are at stake. When the estate is a party to non-testamentary civil litigation, the estate's financial interests are at stake; the estate's worth will vary with the damages awarded for or against it. Some courts have applied the privilege in this setting so that the estate's financial interests cannot be adversely affected by the party-opponent's use of the decedent's attorney-client communications. This situation differs substantially, however, from civil cases in which the estate is not a party (and where the estate's financial interests are not at stake) and from criminal cases (where the estate's financial interests are not at stake and the need for relevant evidence is at its greatest).

This Court in *Glover* stated that the attorney-client communications "*might* be privileged if offered by third persons to establish claims *against an estate*." 165 U.S. at 406 (emphases added). The Court's language conveys doubt whether the privilege applies after death even when the estate is a party, and it indicates that cases where the estate is not a party present even less of a reason to apply the privilege.

3. We turn now from the civil to the criminal arena. In that context, five reported state supreme court cases—and no federal cases—have decided the issue.[20] In two cases (involving husbands who had allegedly murdered their wives), the courts held that the privilege did not

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(which is to say, it contains analysis) than almost all of the other cases discussing the question whether the attorney-client privilege applies after death.

[20] In three decisions by lower state courts, defendants sought information from the attorney of a deceased client. The courts upheld the privilege claims. See *People* v. *Pena*, 198 Cal. Rptr. 819, 828-829 (Cal. App. 1984) (manslaughter); *People* v. *Modzelewski*, 611 N.Y.S.2d 22, 22-23 (N.Y. App. Div. 1994) (assault); *Cooper* v. *State*, 661 P.2d 905, 907 (Okla. Crim. App. 1983) (murder).

exclude communications the wives had made to attorneys before the murders. See *State* v. *Gause*, 458 P.2d 830 (Ariz. 1971), *vacated on other grounds*, 409 U.S. 815 (1972); *State* v. *Kump*, 301 P.2d 808, 815 (Wyo. 1956) ("We can conceive of no public policy which would exclude the communications such as are involved in this case, if otherwise admissible."). In the three remaining cases, where the decedent was a suspect or witness who possessed relevant information, the courts held (over dissents in two cases) that the privilege did apply after death. See *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990); *State* v. *Macumber*, 544 P.2d 1084 (Ariz. 1976); *State* v. *Doster*, 284 S.E.2d 218 (S.C. 1981); cf. *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 72 (Nolan, J., dissenting) (privilege should not apply "where the interests of the client are so insignificant and the interests of justice in obtaining the information so compelling"); *Macumber*, 489 P.2d at 1088 (Holohan, J., joined by Cameron, C.J., specially concurring).

Those cases, in our view, illustrate the profound problems with a privilege that applies after death in criminal proceedings, and thus with petitioners' theory. Suppose, for example, that a crime has been committed and that a now-deceased witness had previously communicated factual information to an attorney that would exculpate the defendant. Under petitioners' theory, that information would not be subject to compelled disclosure—notwithstanding that the defendant might be wrongly indicted or convicted as a result.

These were the facts in *State* v. *Macumber*, the 3-2 decision of the Supreme Court of Arizona holding that the privilege continued to apply after death. The upshot was to expose the defendant to a possible life sentence for a crime that he theoretically may not have committed. This manifest injustice led the American Law Institute to reject *Macumber* as an example of the attorney-client privilege. Restatement § 132 reporter's note (*Macumber* illustration

was rejected by a vote of 164 to 65). Yet the result in *Macumber* is precisely where petitioners' theory would lead.

The now-deceased witness might, on the other hand, have furnished his attorney with information that could incriminate a still-living suspect. That situation, likewise, implicates a substantial societal interest. "[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993). The government has a "powerful and legitimate interest in punishing the guilty." *Id.* at 421 (O'Connor, J., concurring); see also *Stone* v. *Powell*, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring) ("The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade."). Not only does the public have an interest in seeing the criminal law vindicated, but so, too, do the victims of a crime. See *Payne* v. *Tennessee*, 501 U.S. 808, 825 (1991). Petitioners' approach, however, would allow even "a murderer . . . still at large and likely to strike again" to evade justice. *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 73 (Nolan, J., dissenting).

The rule we seek thus is neutral between the defendant and the prosecutor in seeking evidence from a third party. It ensures that more rather than less, whether exculpatory or inculpatory, will be presented to the factfinder. And that is the rightful goal of the prosecutor, see *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and the courts. see *Nixon*, 418 U.S. at 709.

Realizing that their theory leads to manifestly unjust results for criminal defendants, petitioners offer a possible *ad hoc* exception for criminal defendants. They then assert *ipse dixit* that "[t]o allow a prosecutor to break the privilege on the ground that a grand jury's constitutional right to investigate is on a par with possible constitutional

rights of a criminal defendant would be a radical, problematical step fraught with unforeseen consequences." Pet. Br. 29. With all respect, that statement is unintelligible. This Court has stated: "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed *either by the prosecution or by the defense.*" *Nixon*, 418 U.S. at 709 (emphasis added).[21] And we are not aware of (and petitioners do not reference) a third-party witness' common-law privilege that applies against the prosecution, but not against the defense.[22]

In any event, no basis exists for granting a criminal defendant greater power than the *grand jury* to override a witness' common-law privilege. The text of the Fifth Amendment reveals that the grand jury is a constitutionally mandated protection against an unfounded prosecution. And this Court has emphasized the grand jury's dual role: "Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed *and the protection of citizens against unfounded criminal prosecutions.*" *Calandra*, 414

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[21] The Compulsory Process Clause ensures parity between prosecutor and defendant in overriding the privileges of a third-party witness; it does not give the defendant a greater ability to do so than the prosecutor. See A. Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 699-700 (1996).

[22] Indeed, petitioners' *ad hoc* suggestion of a possible distinction between the defendant and prosecution contravenes settled practice when a third-party witness asserts the Fifth Amendment privilege against compelled self-incrimination. In that situation, the prosecutor can compel the witness to testify through a grant of immunity. See *United States* v. *Heldt*, 668 F.2d 1238, 1282-1283 (D.C. Cir. 1981). The prosecutor thus has a greater ability to override a third-party witness' privilege than does the defendant.

Petitioners also imply that *Davis* v. *Alaska*, 415 U.S. 308 (1974), supports a distinction between the abilities of the grand jury and the defendant to override a third party's common-law privilege claim. That Confrontation Clause case is not on point. It addressed a state rule that impermissibly limited the scope of cross-examination.

U.S. at 343 (emphasis added); see *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) (grand jury is "primary security to the innocent against hasty, malicious and oppressive" prosecution). The "mission is to *clear the innocent*, no less than to bring to trial those who may be guilty." *Dionisio*, 410 U.S. at 16-17 (emphasis added).

Because the grand jury's task "is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." *Branzburg*, 408 U.S. at 688. The grand jury—as much as any party—therefore has the constitutional right to every person's evidence. If a defendant could override a third-party witness' common-law privilege at trial, the grand jury can do so now.

The practical implications of petitioners' apparent attempt to distinguish the grand jury from a defendant further expose the flaws of their theory. Petitioners state that their notes can be withheld as a matter of law from the grand jury—even if they might exculpate some individual. But if the grand jury indicts the individual, then that defendant might subpoena petitioners' notes, which could be exculpatory. Not to put too fine a point on it, petitioners' theory could mean that this grand jury will indict one or more individuals who later will be exonerated with the help of petitioners' notes. That does not reflect "reason."

In short, petitioners' suggestion that "[t]he Court can decide the present matter without reaching the different issue of a defendant's possible constitutional right to privileged material," Pet. Br. 29, is fanciful. To hold in petitioners' favor is a decision that the perpetual attorney-client privilege for the deceased client's attorney overrides the rights of the grand jury, the defendant, *and* the prosecutor to obtain evidence—no matter how inculpatory or exculpatory the information might be. If the result in *Macumber* (whereby a criminal defendant, and thus also a grand jury, cannot obtain the evidence of an attorney for

a deceased client) represents the correct privilege rule for the federal courts, petitioners should prevail. If the result in *Macumber* does not represent the correct rule for federal courts, petitioners must produce their notes.

4. We turn next to the various rules and codes—including state codes, the Model Code of Evidence, the Uniform Rules, and Proposed Federal Rule 503—to determine what light they might shed on the issue. See, *e.g.*, *Trammel*, 445 U.S. at 48-49.

As a prelude, it is important to note that the various interests at stake do not terminate simultaneously after death. The *financial* interests of the estate terminate when the estate is closed. A privilege rule designed to protect the financial interests of the estate would apply in the period until the estate is closed.

The reputational interests of the decedent and the legal interests of the decedent's friends or associates, by contrast, do not expire when the estate is closed; to the contrary, such interests continue indefinitely. Thus, a privilege rule designed to protect those interests would apply indefinitely.

While "almost no attorney-client privilege provision speaks directly to the issue of privilege after the client's death," 6 Geo. J. Legal Ethics at 55 n.52, the rules generally provide that the attorney-client privilege ends *at death* in will-contest cases. Many (including the Model Code, Uniform Rules, and Proposed Federal Rule) also include a generic provision to the effect that the privilege belongs to the "personal representative of a deceased client," who is the executor or administrator of the decedent's estate. See Restatement § 127 reporter's note ("In general, modern evidence codes reflect the view that the privilege may be asserted by the personal representative of a deceased client[,] either an executor or administrator.").[23]

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[23] The following provisions set forth the testamentary rule that the privilege does not apply after death: Proposed Fed. R. Evid.

The executor or administrator exists, however, only until the estate is closed. After that, then, no holder of the privilege exists, and the privilege has terminated. The rules thus suggest that the privilege cannot be asserted after the estate is wound up.[24] As the court of appeals

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503(d)(2); ALI Model Code of Evid. R. 213(2)(a) (1942); Unif. R. Evid. 26(2)(b) (1953); Unif. R. Evid. 502(d)(2) (1974); Ala. R. Evid. 502(d)(2); Ark. R. Evid. 502(d)(2); Cal. Evid. Code § 957; Del. R. Evid. 502(d)(2); Fla. Stat. Ann. § 90.502(4)(b); Haw. R. Evid. 503(d)(3); Idaho R. Evid. 502(d)(2); Kan. Stat. Ann. § 60-426(b); Ky. R. Evid. 503(d)(2); La. Code Evid. Ann. art. 506(C)(2); Me. R. Evid. 502(d)(2); Neb. Rev. Stat. § 27-503(4)(b); N.H. R. Evid. 502(d)(2); N.J. Stat. Ann. § 2A:84A-20(2); N.M. R. Evid. 11-503(D)(2); N.D. R. Evid. 502(d)(2); Okla. Stat. Ann. tit. 12 § 2502(D)(2); Or. R. Evid. 503(4)(b); Tex. R. Evid. 503(d)(2); Utah R. Evid. 504(d)(2); Vt. R. Evid. 502(d)(2); Wis. Stat. Ann. § 905.03(4)(b).

The following rules provide for the "personal representative" of the deceased to hold the privilege: Proposed Fed. R. Evid. 503(c); ALI Model Code of Evid. R. 209(c)(i) (1942); Unif. R. Evid. 26(1) (1953); Unif. R. Evid. 502(c) (1974); Ala. R. Evid. 502(c); Ark. R. Evid. 502(c); Cal. Evid. Code § 953(c); Del. R. Evid. 502(c); Fla. Stat. Ann. § 90.502(3)(c); Haw. R. Evid. 503(c); Idaho R. Evid. 502(c); Kan. Stat. Ann. § 60-426(a); Ky. R. Evid. 503(c); Me. R. Evid. 502(c); Miss. Code Ann. § 13-1-21(1); Neb. Rev. Stat. § 27-503(3); Nev. Stat. Rev. § 49-105(1); N.H. R. Evid. 502(c); N.J. Stat. Ann. § 2A:84A-20(1); N.M. R. Evid. 11-503(C); N.D. R. Evid. 502(c); Okla. Stat. Ann. tit. 12 § 2502(C); Or. R. Evid. 503(3); S.D. R. Evid. 502(c); Tex. R. Evid. 503(c); Utah R. Evid. 504(c); Vt. R. Evid. 502(c); Wis. Stat. Ann. § 905.03(3); Wyo. Stat. § 1-43-103(b).

[24] The history behind this language confirms that the "personal representative" provision was an intentional limitation on the duration of the privilege:

> It was the view of the reforming scholars that shaped the provision in the [1942] Model Code of Evidence that made "the personal representative of the deceased client" the holder of the privilege after the death of the client, thus cutting off the privilege when the estate was wound up. . . . [*T*]*he attempts by traditionalists to extend the life of the privilege beyond the winding up of the estate through amendments that would have made the privilege pass to the heir or devisee or have given the judge discretion to invoke the privilege when there was no longer a holder in existence were all defeated.* It seems reasonable to suppose that the use of similar language in the Uniform Rules was intended to have a similar effect. . . . The writers apparently agree that the Rejected [Federal Rule 503] intends to embrace the Model Code-California view of the phrase "personal representative" as a limitation on the duration of the privilege . . . .

Wright & Graham § 5498, at 485-486 (emphasis added).

[25] In the words of the comment accompanying the California rule, "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged." Cal. Evid. Code § 954 cmt. Proposed Federal Rule 503(c) followed the California rule. See advisory committee's note. The import of the Proposed Federal Rule was straightforward: "[W]hen the client has died and his personal affairs have been settled, the need for the privilege has diminished to the extent that it is no longer justified." Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 Wayne L. Rev. 1287, 1315 (1969).

explained, "[v]esting the privilege in the personal representative is plainly consistent with its terminating at the winding up of the estate, when its function of protecting the decedent's transmission of his or her property to the intended beneficiaries, free from claims based on statements to counsel, has run its course." Pet. App. 4a n.2. The intent of these rules thus is not to protect the reputational interests of the client or the legal or reputational interests of others, all of which outlast the estate. Rather, the intent is to protect the financial interests of the estate itself.[25]

Disclosure of attorney-client communications in *criminal* cases (where the estate is not a party) would not affect the financial interests of the estate, however. Rather, the disclosure in criminal proceedings—whether before or after the estate is wound up—would affect only the reputational interests of the decedent and the legal and reputational interests of others. But as we have seen, these privilege rules were not intended to protect the reputational interests of the client or the legal or reputational

interests of others. And if that is so, then the privilege should not apply after death in criminal proceedings.[26]

To be sure, the various rules do not speak directly to criminal proceedings. Nor is there helpful case law discussion regarding the import of the "personal representative" language to the issue. But the task is to divine whatever guidance we can from the rules (and their history) as one of the mix of considerations that guide resolution of this case. Here, the rules support the conclusion that the privilege does not apply after death in federal criminal proceedings.

And when the rules are analyzed together with the vast majority of cases, a broader theme emerges. Attorney-client communications are not privileged after the death of the client—with the possible exception that communications "might be privileged if offered by third persons to establish claims against an estate," or vice versa. *Glover*, 165 U.S. at 406. The upshot is this: The privilege should not apply after death in criminal cases.

D. The policies of the attorney-client privilege are not served, and indeed are contravened, by applying the privilege in federal criminal proceedings after the death of the client.

Notwithstanding (i) the Restatement, (ii) the views of scholars and commentators, (iii) the force of the case law, (iv) the injustices petitioners' approach would inevitably produce in criminal proceedings, and (v) the principles underlying the various privilege rules, petitioners rest much of their argument on a purported "chilling effect"—namely, that clients would be less willing to disclose truthful information to an attorney without a posthumous

[26] Petitioners do not suggest that the winding up of the estate is significant to the proper privilege rule in *criminal* procedings—and we agree. For criminal proceedings, the privilege either must end at death (as we argue) or extend such that it can be asserted indefinitely (as petitioners argue).

attorney-client privilege for federal criminal proceedings. For several reasons, the argument fails. As we will now explain, the rule that the privilege does not apply after death in criminal proceedings would not chill *any* appropriate attorney-client communications. Even if there were some marginal chilling effect, it is insufficient to frustrate the grand jury's imperative need for information.

1. The attorney-client privilege, to the extent it existed in England from the 1500s through the 1700s, was part of the broader "code of a gentleman" that prevented attorneys as well as other "gentlemen" from breaching anything told to them in confidence. Restatement § 118 cmt. c; 3 *Weinstein's Federal Evidence* § 503.03[1], at 503-11 (2d ed. 1998); D. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1, 3-4 (1998). An attorney thus was a kind of alter ego of the client, such that if the client did not testify, then neither could the attorney.[27] This was a rule "congenial with the law, which prevailed in England until the mid-19th century, that made parties to litigation themselves incompetent to testify, whether called as witnesses in their own behalf or by their adversaries." Restatement § 118 cmt. c.[28]

In this country, the privilege has never been justified by any such social convention. Indeed, by the last quarter of the 1700s, the "code of a gentleman" rationale had been repudiated, as "the need of the ascertainment of truth for the ends of justice loomed larger than the pledge of secrecy." *McCormick* § 87, at 314. This Court thus has recognized that "the mere fact that a communication was made in express confidence, or in the implied confidence

[27] Some older American cases exhibit rhetorical excesses—a "lawyer's tongue is tied"—that are relics of the days when the privilege was justified by the permanent oath of a gentleman.

[28] For that reason, "the historical record is not authority for a broadly stated rule" of attorney-client privilege. G. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1070 (1978).

of a confidential relation, does not create a privilege." *Branzburg*, 408 U.S. at 682 n.21.

The modern rationale for the attorney-client privilege is that confidentiality facilitates an individual's ability to obtain effective legal advice and services. See *Zolin*, 491 U.S. at 562; *Upjohn*, 449 U.S. at 389; *Fisher*, 425 U.S. at 403. This conception of the privilege stems from several related assumptions. Individuals need lawyers to determine whether their conduct would or did violate legal norms, and how to respond to the legal process. In addition, the client needs to disclose various facts to the lawyer in order for the client to receive the lawyer's best assessment of the legal ramifications of his actions. *Zolin*, 491 U.S. at 562. The final assumption—which is "controversial"—is that clients would be unwilling to fully disclose facts if the lawyer could be required to testify in their cases. Restatement § 118 cmt. c. The theory is that the client "has in contemplation the possible official inquiry, and he will not make revelations that may be used to his detriment." E. Morgan, *Foreword to Model Code of Evidence* 26 (ALI 1942). See also M. Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Cal. L. Rev. 487, 490 (1928) (privilege protects against clients' "fear that the lawyer's knowledge of these facts may be used to establish claims against them or subject them to penalties").[29]

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[29] Many scholars have questioned whether this assumption is accurate outside the context of those cases in which the client subsequently asserts the Fifth Amendment privilege against compelled self-incrimination. Indeed, the leading empirical study of the privilege concluded that lawyers are more likely than non-lawyers to believe that the privilege encourages client disclosures. That study concluded that a substantial majority of laypersons would continue to use lawyers even if secrecy were limited. Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1232 (1962).

2. In a particular legal proceeding in which the client becomes a witness, the client will do one of two things: (i) rest on the Fifth Amendment privilege against compelled self-incrimination, or (ii) testify. The attorney-client privilege serves somewhat different purposes in the two situations.

For the client who invokes the Fifth Amendment, the attorney-client privilege stands as a corollary to the privilege against compelled self-incrimination. *Weinstein's Federal Evidence* § 5.03.03[1], at 503-12 (attorney-client privilege "is closely related to the individual's right to immunity from self-incrimination under the Fifth Amendment"). That is to say, the client needs to disclose facts to his attorney to obtain the attorney's advice about whether to interpose the Fifth Amendment privilege. Effective professional consultation could scarcely occur if the attorney could be required to turn around and testify against the non-testifying client. See *Fisher*, 425 U.S. at 403 (recognizing that client would be reluctant to disclose "if the client knows that damaging information could *more readily* be obtained from the attorney following disclosure than from himself"—that is, in those situations where the client asserts the Fifth Amendment) (emphasis added). For this reason, supporters and critics alike generally acknowledge the importance of the attorney-client privilege in cases where the client also asserts the Fifth Amendment privilege.[30]

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[30] See, *e.g.*, Morgan, *Foreword*, at 27 ("In situations where the privilege against self-incrimination is involved, the retention of the privilege is justified."); Wright & Graham § 5472, at 95 ("combined effect of the Sixth Amendment right of counsel and the Fifth Amendment privilege against self-incrimination is sometimes thought to provide a constitutional basis for the attorney-client privilege"); Wigmore § 2291, at 552 (attorney-client privilege in case where client asserts privilege against self-incrimination protects against "some of the same evils" that "constitute the reasons for forbidding compulsory self-incrimination"); Radin, 16 Cal. L. Rev. at 490 (justification for attorney-client privilege is "part of the public policy against self-incrimination").

Those clients who do not invoke the Fifth Amendment privilege fall into two categories: clients who will testify truthfully under oath, and those who will not.

The attorney-client privilege would be of enormous benefit to the client who contemplated perjury because he could learn from his attorney the legal consequences of his actions and testimony, and then change (or mold) his testimony in an attempt to evade those consequences. That is an unhappy byproduct of the privilege, but it is *not* a justification for the privilege. See *Brogan* v. *United States*, 118 S. Ct. 805, 810 (1998) (law does not confer "a privilege to lie"); *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely."). The law manifestly is not designed to benefit the client who will perjure himself. See *United States* v. *Mandujano*, 425 U.S. 564, 576 (1976) ("Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings."). "When a client consults a lawyer intending to violate elemental legal obligations, there is less social interest in protecting the communication. Correlatively, there is a public interest in preventing clients from attempting to misuse the client-lawyer relationship for seriously harmful ends." Restatement § 132 cmt. b. Therefore, just as "*Miranda* cannot be perverted into a license to use perjury," *Oregon* v. *Hass*, 420 U.S. 714, 721 (1975) (quotation omitted), the attorney-client privilege cannot be perverted into an aider and abettor of perjury.

Indeed, the courts and the bar organizations, including the ABA, have taken steps to prevent such client wrongdoing. Longstanding ethical rules, of which this Court spoke approvingly in *Nix* v. *Whiteside*, require that an attorney take action to prevent a client from testifying falsely—even though the upshot will be to breach the confidentiality of attorney-client communications and (possibly) lead to "grave consequences" for the client. See

ABA Model Rule of Professional Conduct 3.3 cmt.[31] The crime-fraud exception likewise is triggered when a client communicates to his attorney in order to further the future crime of perjury. See *Clark* v. *United States*, 289 U.S. 1, 15 (1933) ("A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."); A. Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 698-699 (1996) ("The Sixth Amendment gives the accused a right to show he did not engage in 'infamous' conduct, not a right to perpetrate infamous conduct . . . .").

The client who will testify truthfully, on the other hand, will simply tell her attorney the same *facts* that she will disclose under oath. See *Upjohn*, 449 U.S. at 395 ("[T]he protection of the privilege extends only to communications and not to facts.") (quotation omitted).[32] For such a client, the lack of a privilege would cause no meaningful "chilling effect" on the *truthfulness* of communications to her attorney because the truth would "be revealed anyway . . . from the client directly in discovery or testimony." Fischel, 65 U. Chi. L. Rev. at 26; cf. *Brogan*, 118 S. Ct. at 810 ("the honest and contrite guilty person will not regard . . . the blatant lie as an available option" when she chooses to testify).

3. These conclusions about how the privilege interacts with the behavior of clients raise an important question: Why does federal law recognize the attorney-client privilege in cases in which the client testifies? The answer is twofold.

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[31] This duty distinguishes attorneys from other professionals who receive evidentiary privileges, yet no equivalent duty.

[32] "Whether the client be a plaintiff or a defendant or a mere witness, he is subject to compulsory process and may be required to disclose at the trial or hearing every pertinent fact within his knowledge, under the sanction of an oath or its equivalent that obliges him to tell the whole truth. If he told his lawyer the truth, he must now tell the same thing from the witness box." Morgan, *Foreword*, at 26.

First, the privilege rests on an assumption that the attorney's testimony would be superfluous because the client himself "can be freely interrogated and called to the stand by the opponent and made to disclose [o]n oath all that he knows." Wigmore § 2292, at 554. Thus, "the disclosure of his admissions made to his attorney would add little to the proof." *Ibid.*

This Court pointed to that critical fact in explaining the logic and rationale of the attorney-client privilege in *Upjohn*: "Here the Government was free to question the employees who communicated" with the company attorneys, and that "puts the [Government] in no worse position" in obtaining the facts. 449 U.S. at 396, 395.[33] The court of appeals correctly summarized the relevant principle: The client's "availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to truth." Pet. App. 7a.

To be sure, there is a lurking danger that the client will testify falsely and in a manner inconsistent with what he told his attorney. But the client is under a legal obligation, enforced by stringent penalties, to testify truthfully. See *Mandujano*, 425 U.S. at 576; 18 U.S.C. 1001, 1621, 1623. That obligation is reinforced by the rigors of cross-examination. And it is cemented by the attorney's equally solemn duty to prevent perjury. See ABA Model Rule of Professional Conduct 3.3. *So the attorney-client privilege in instances where the client testifies operates on the assumption that the client will testify truthfully, which logically eliminates any need for attorney testimony.* See *Upjohn*, 449 U.S. at 395 (privilege "puts the adversary in no worse position" because it "does not protect disclosure

[33] See also *Hickman* v. *Taylor*, 329 U.S. 495, 518 (1947) (Jackson, J., concurring) ("Having been supplied the names of the witnesses, petitioner's lawyer gives no reason why he cannot interview them himself."). Professors Wright and Graham have noted the privilege's proponents "argue that its costs are minimal. . . . [T]he client . . . must still testify to his knowledge of the facts." Wright & Graham § 5472, at 85.

of the underlying facts by those who communicated with the attorney").

Second, the attorney's testimony can easily generate a sideshow focused on purported discrepancies between the attorney's testimony and the client's testimony. See *Hickman* v. *Taylor*, 329 U.S. 495, 517 (1947) (Jackson, J., concurring) ("Whenever the testimony of the witness would differ from the 'exact' statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness."). If attorney and client both testify, "[o]pposing counsel could create a false impression of the circumstances in a great many instances. . . . [A] lawyer skilled in histrionics could make a field day of it." J. Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 Vill. L. Rev. 279, 310 (1963). Such diversions, if successful, could easily detract from, rather than contribute to, the truthseeking function. And the diversions could perhaps even cause the client to lose the case (or some future case).[34] The privilege thus precludes the "abusive litigation practice" of calling an opposing lawyer as a witness. Restatement § 118 cmt. c.

4. As suggested by the virtually unanimous position of the ALI, the commentators, the case law, and the rulemakers, these justifications for the attorney-client privilege evaporate when the client is deceased, particularly in criminal proceedings.

First, the possibility of criminal liability ceases at death. The privilege is no longer necessary after the death of the

[34] The rationales for the attorney-client privilege in cases in which the client testifies substantially overlap with the rationales for the attorney work product doctrine. That should not be surprising, given that the two doctrines stem from the same common-law source and often apply to the same documents. See Note, *Attorney-Client Privilege and Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 Harv. L. Rev. 1697, 1700 (1995); Wright & Graham § 5472, at 94 ("the attorney-client privilege and the work product doctrine have had something of a symbiotic historical relationship").

client as a corollary to the privilege against compelled self-incrimination.[35]

Second, the deceased client obviously will not testify. Thus, the myriad problems that can arise when both attorney and client testify in the same case are absent.

Third, the client is not available to testify directly. Application of the privilege after death thus causes an enormous loss of evidence—far more than is caused by application of the privilege before death.[36] "[I]mposing the privilege after the death will often result in a loss of crucial information because the client is no longer available to be asked what he knows." Wright & Graham § 5498, at 484. In other words, application of the privilege after death of the client "in effect gives *an expanded scope* to the privilege." Wolfram § 6.3.4, at 256 (emphasis added). The court of appeals emphasized this critical fact, noting that the "costs of protecting communications after death are high." Pet. App. 7a.

The only real retort is one that petitioners understandably do not *explicitly* make: The living client might perjure himself if he were alive; requiring the attorney to testify after the client's death thus discloses different in-

[35] This may distinguish the deceased witness from the witness who is simply unavailable. With respect to the unavailable witness who is not deceased, the attorney's testimony may contribute to his criminal liability in some future case, notwithstanding that the witness might have asserted the Fifth Amendment had he been available to testify in the underlying case.

[36] Some living clients may assert the Fifth Amendment privilege, but such witnesses not uncommonly can be granted immunity if they are not prosecuted. See 18 U.S.C. 6002, 6003. If the witness is granted immunity, "[t]he immunity . . . does not endow the person who testifies with a license to commit perjury." *Mandujano*, 425 U.S. at 578 (quotation omitted). Because the witness will testify, the attorney's testimony is considered unnecessary. If the witness is not granted immunity, then the attorney-client privilege is necessary to protect the privilege against compelled self-incrimination.

formation than the client would have disclosed were he alive; therefore, clients who want to preserve the option to commit perjury are "chilled" from telling their attorneys the truth because of the fear that the truth might come out if the attorney is called to testify after the client's death.

It would be unprecedented and unwise to apply an expanded privilege after death based on the possibility that the client, if alive, might have chosen to perjure himself in violation of federal law. Yet that is what petitioners' submission implicitly seeks from this Court. Indeed, petitioners' entire theory is acrid with the odor of presumed perjury—perjury that the client might have committed had he been alive. The Court need not "write into our law this species of compassion inflation." *Brogan*, 118 S. Ct. at 810.

In the end, the rule that the privilege does not apply after death in criminal proceedings should cause *no* chilling effect whatsoever on *appropriate* attorney-client communications—that is, on clients who intend to testify truthfully or assert the Fifth Amendment.

5. Even if we were to assume, however, that (i) the rule we seek could have some chilling effect on clients who would assert the Fifth Amendment or testify truthfully, *or* (ii) the courts should be concerned about a chilling effect on those who would commit perjury, petitioners' chilling effect argument is still unavailing for several independent reasons. Any possible chilling effect would be extraordinarily marginal; and marginal chilling effects on protected relationships are insufficient, the law has clearly established, to justify an intrusion on the grand jury's need for relevant evidence.

At the outset, petitioners' argument based on chilling effect assumes that clients know the details of the relevant confidentiality and privilege rules when they speak to lawyers. The minimal available evidence suggests that the

assumption is inaccurate. "The privilege has intricate and unexpected limitations of which we may be certain almost no client has ever been warned." Marvin Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 Colo. L. Rev. 51, 59 (1982). Indeed, the "most striking revelation" of a study conducted in the late 1980s was that "lawyers overwhelmingly do not tell clients of confidentiality rules." F. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 382 (1989).[37]

Second, assuming full client knowledge, analysis of a rule's possible effect on candid client communications must consider (i) the likely frequency of disclosure; (ii) the fora in which the information would be disclosed; and (iii) the additional information that would be disclosed by virtue of the rule in question.

Disclosure of attorney-client communications after the death of the client in federal criminal investigations is likely to be quite infrequent. This is the first reported federal case, and there are only a handful of reported state criminal cases. In addition, information sought from an attorney must be relevant. See Fed. R. Crim. P. 17(c).[38]

The attorney's information is disclosed to a grand jury that, by law, operates in secret. See Fed. R. Crim. P.

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[37] Informing clients that the privilege terminates at death would sound like a *Miranda* warning, petitioners say. Pet. Br. 12. Petitioners' rhetoric is familiar. The "*Miranda* warning" hypothetical has regularly been invoked by those who oppose *existing* legal and ethical precepts requiring lawyers to prevent client perjury. See M. Freedman, *Lawyer-Client Confidences: The Model Rules' Radical Assault on Tradition*, 68 A.B.A. J. 428, 431 (1982). The rhetoric conjures up an image of the lawyer—as alter ego of the client first and officer of the court a distant second—that was rejected by this Court in *Nix* v. *Whiteside*.

[38] For example, as the court of appeals concluded, the district court on remand may review the notes and determine which parts of petitioners' notes are relevant to the grand jury's Travel Office investigation.

6(e). "[T]he characteristic secrecy of grand jury proceedings is a further protection against the undue invasion" of an important relationship. *Branzburg*, 408 U.S. at 700.[39] To be sure, public criminal trials can develop out of grand jury investigations. At trial, however, only relevant *and* admissible statements are disclosed—and hearsay rules will limit the chance of admissibility. Cf. Fed. R. Evid. 804(b).[40]

The factual information disclosed by the attorney will simply be the same information that the client, if alive, would have disclosed himself. As noted above, that fact logically eliminates any chilling effect. And the client will be deceased when the attorney discloses the client's information, a fact that alleviates the most direct harm (*i.e.*, liability) that the client could foresee while talking to his or her attorney.

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[39] Also, the lack of an evidentiary privilege does *not* mean that attorneys are free to voluntarily disclose client information to the public. See ABA Model Rule of Professional Conduct 1.6.

[40] The court of appeals stated that attorney-client communications of the deceased client will be produced in criminal proceedings if their "relative importance is substantial." Pet. App. 10a. In the grand jury context, that formulation, which the court of appeals found "plainly met" here, *id.* at 11a, is equivalent to relevance: Relative importance is a constantly shifting concept (sometimes on a daily basis) in a grand jury investigation. "It is only after the grand jury has examined the evidence" that such a determination can be made. *Branzburg*, 408 U.S. at 701-702; see also *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991).

The court of appeals predicted that when there is an "abundance of disinterested witnesses with unimpaired opportunities to perceive an unimpaired memory, there would normally be little basis for intrusion on the intended confidentiality." Pet. App. 10a. That is accurate in the trial setting. In the grand jury context, as this Court emphasized in *Branzburg*, the government cannot and thus need not show that the subpoena recipients "possess relevant information not available from other sources" because this determination can be made only after a "thorough and extensive investigation." 408 U.S. at 701.

Third, the law has established several rules relating to the attorney-client relationship that pose *serious* risks to the confidentiality of attorney-client communications. Therefore, even assuming a marginal effect on client communications by a rule that the privilege does not apply after death in criminal proceedings, that effect would pale by comparison to the effect caused by these settled rules.

One is the rule that the attorney cannot assist or even tolerate client perjury. Model Rule of Professional Conduct 3.3(a)(4) states: "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."[41] In *Nix* v. *Whiteside*, this Court emphasized that there is "no breach of professional duty in [an attorney's] admonition to [his client] that he would disclose [the client's] perjury to the court. . . . No system of justice worthy of the name can tolerate a lesser standard." 475 U.S. at 174. In light of Model Rule 3.3 (and its local versions), a client talking to his attorney should know that the law and his attorney will prevent him from dishonestly altering his story when he later testifies.[42]

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[41] Comments to Model Rule 3.3 state:

> Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures. . . . Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury.

[42] There is anecdotal evidence that lawyers do *not* seek the full factual picture from their clients so as not to trigger their ethical responsibilities. This technique is followed "in order to avoid being compromised in deciding whether to put [the client] on the witness stand." S. Gillers, *Regulation of Lawyers* 390 (4th ed. 1995). Moreover, clients often lie to their lawyers. "How much clients lie to lawyers . . . is a regular topic, the consensus suggesting a lot." Marvin Frankel, *Clients' Perjury and Lawyers' Options*, 1 J. Inst. for Study of Legal Ethics 25, 35 (1996).

These two facts illustrate the *enormous* chilling effect caused by existing ethics rules.

The attorney's actual or threatened disclosure of attorney-client communications in order to prevent perjury can produce "grave consequences" for the client. Such consequences are *far more direct* and *far more severe* than the possibility of harm to one's reputation and one's associates caused by *posthumous* disclosure of attorney-client communications in a criminal investigation.

The other relevant factor, as explained above, is the testamentary rule. Even assuming that clients would be marginally chilled by the prospect of a posthumous disclosure of attorney-client communications in a criminal investigation, the testamentary rule poses at least as great a chilling effect on attorney-client communications—yet the law has required disclosure in such cases. Cf. *University of Pennsylvania*, 493 U.S. at 201 (rejecting chilling-effect argument in peer review case by comparing it to chilling effect in reporter's source privilege case, which the Court had already rejected).

In sum, even assuming that some marginal chilling effect is caused by terminating the privilege at death, that effect is outweighed by the imperative need for relevant evidence exacerbated by the deceased client's unavailability. See *Branzburg*, 408 U.S. at 695 ("we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants").

E. A client's desire to protect his reputation or to protect others does not itself justify nondisclosure of information either before or after death.

Petitioners expend considerable energy and rhetoric proving the unremarkable proposition that individuals care

about their reputations, and that at least some persons also care about their posthumous legacy. Petitioners note, in addition, that clients care about their loved ones, friends, and associates. We agree. But these truisms fail to advance petitioners' argument.

When living, the client cannot refuse to disclose information on the ground that it might harm his reputation. The Fifth Amendment applies only to testimony that would be self-*incriminating*. *Calandra*, 414 U.S. at 353. ("[A] witness has no right of privacy before the grand jury.").[43] Nor can the client refuse to disclose information on the ground that it might be incriminating or damaging to others. *Mandujano*, 425 U.S. at 572 ("The privilege cannot . . . be asserted by a witness to protect others from possible criminal prosecution."). The individual must disclose all relevant information—and must do so truthfully. See 18 U.S.C. 1001, 1621, 1623.

After death, the attorney's testimony in some cases might conceivably affect the decedent's posthumous reputation (positively or negatively) or the decedent's associates (positively or negatively). But *the information is the same factual information that the client himself would have been legally required to disclose if he were alive.* Such information is disclosed *not* because of the client's death, but because the client's information has been sought in a criminal investigation or trial. The client's death means only that the attorney, rather than the client himself, will provide the information. Petitioners' rule, by contrast, would mean that important information the client possesses would be disclosed if the client is alive, but concealed from the grand jury if the client is deceased. That would result in the anomaly that the protection of

[43] Posthumous reputation is generally *less* protected by the libel and defamation laws than reputation of a living person. See *Robertson* v. *Wegmann*, 436 U.S. 584, 591 n.6 (1978) ("action for defamation abates on the plaintiff's death in the vast majority of States").

the client's reputation and the client's associates would be greater after the client's death.[44]

F. The rule that the privilege does not apply after death in federal criminal proceedings is not discriminatory.

Petitioners argue that "people in the final stages of life frequently feel a particular need to speak with an attorney to put their own affairs in order or to resolve family or business problems." Pet. Br. 19. But the most likely issue about which a dying client might consult his attorney to "order his affairs" is his will and the disposition of his property. *Yet that is the precise circumstance where this Court and courts throughout the country have consistently concluded that the privilege does not survive death.* See Wright & Graham § 5498, at 484 n.13 ("The common instance of concern for posthumous regard is the client who is writing a will or otherwise providing for the devolution of his property.").[45]

And again, the relevant event for disclosure is not the fact of death, but the fact that the client's information is sought in a criminal proceeding. If an individual consults an attorney and the client's information is later sought in

[44] "[I]f the attorney-client privilege were intended to vindicate a regime of privacy, one would be inclined to extend a similar protection to all other arguably private relationships. Friends and lovers, for example, are surely at least as intimate in their interactions as an attorney and his client. Yet a protection of such great scope would swallow up much of the law of evidence." Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 Harv. L. Rev. 464, 483 (1977).

[45] In petitioners' featured hypothetical, a client consults an attorney to seek legal advice about matters that threaten his friends, associates, and family. Pet. Br. 7. But that scenario does not appear even to meet the threshold elements of the privilege. "[T]he privilege will not arise if the person claiming it sought the interview with or retained the attorney to enable the attorney to advise or assist someone else." M. Larkin, *Federal Testimonial Privileges* § 2.02, at 2-17 (1998).

a criminal proceeding, the client must testify truthfully; if he is deceased, his attorney will simply disclose the same information that the client would have disclosed.

II. THE WORK PRODUCT DOCTRINE DOES NOT PROTECT PETITIONERS' NOTES.

As we contended in the court of appeals, and do so again in this Court, either of two alternative arguments—each related to the fact that Mr. Foster is deceased—resolves the work product issue readily and narrowly.

A. The work product doctrine has not been applied to protect work prepared by an attorney for a client who now is deceased and no longer can be a party in litigation.

Our initial work product argument essentially duplicates our attorney-client privilege argument. It would be contrary to settled work product principles, not to mention illogical, to apply the work product doctrine on behalf of a deceased client.[46]

The theory of the work product doctrine—explicit in Civil Rule 26(b)(3) and assumed to apply to grand jury proceedings by inference from *United States* v. *Nobles*, 422 U.S. 225, 238 (1975)—demonstrates that the doctrine cannot be asserted to protect work done by an attorney for a client who is now deceased. As initially conceived and applied, the work product doctrine applied *only* in the litigation for which the work was performed. The question later raised was whether the work product doctrine should apply to documents that were prepared by the client's attorney in anticipation of some *other* litigation. See Note, *The Work Product Doctrine*, 68 Cornell L. Rev. 760, 855-861 (1983). This Court effectively resolved the question in *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 25-26 (1983), suggesting that the doctrine should be

[46] Thus, if we prevail on the attorney-client issue, we should prevail on the work product issue.

so extended. It would be unfair to penalize a party in litigation by requiring it to produce work its attorneys had produced for other litigation. In particular, litigants "who face litigation of a commonly recurring type . . . have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes." *Id.* at 31 (Brennan, J., concurring).

But the rationale for extending the work product doctrine in *Grolier* does not extend so far as to cover work prepared for a client who no longer will be involved in litigation *at all*. Therefore, because all possibility of criminal litigation ceases with the client's death, the purposes of the work product doctrine could not conceivably be served in any way by applying it to an attorney's work for a client who is now deceased.[47] The doctrine has not been extended so far—and should not be extended so far here.

B. Alternatively, because Mr. Foster is deceased and thus unavailable for questioning, the OIC has demonstrated sufficient need for petitioners' notes.

For purposes of our alternative work product argument, the key fact is that the witness (Mr. Foster) interviewed by Mr. Hamilton is now deceased. In such circumstances, the settled rule is that the grand jury can obtain an attorney's notes of the interview to the extent they reflect or relate a witness' statements or recollections and the contextual questions asked.

Opinion work product (the mental impressions, conclusions, opinions, or legal theories of an attorney) receives

[47] The work product doctrine protects the interests of the client. To do so, the doctrine applies to legal work performed for the client. "From its inception, . . . the courts have stressed that the [work product] privilege is not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself." *Moody* v. *IRS*, 654 F.2d 795, 800 (D.C. Cir. 1981) (quotation omitted).

a very high level of work product protection. See Fed. R. Civ. P. 26(b)(3). Fact or ordinary work product (such as a witness' transcribed, recorded, or signed statement) is subject to disclosure upon a showing of need—when, for example, the witness is now deceased or otherwise unavailable for questioning. See Fed. R. Civ. P. 26(b)(3) advisory committee's note; *Hickman*, 329 U.S. at 511 ("[P]roduction might be justified where the witnesses are no longer available . . . .").

Here, we are concerned not with a transcribed or recorded interview or signed statement, but with attorney notes of a witness interview. Petitioners suggest that *no* portions of an attorney's notes, even the factual elements of a witness interview, can ever be produced, even upon a showing of witness unavailability. Pet. Br. 33 & n.37. In petitioners' view, attorney notes are inviolable under all circumstances. That is clearly wrong.

Courts have not treated attorneys' memoranda or notes of witness interviews in an all-or-nothing manner, as entirely fact work product or entirely opinion work product. Instead, the factual portions of the attorney notes—such as those recording or reflecting what the witness said and the contextual questions asked—must be produced upon a showing of need (for example, an unavailable witness).

It is established that "a showing that a witness is deceased is usually sufficient to require the production of work-product materials." E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 354 (1997). Two federal courts of appeals have addressed this situation and followed this common-sense rule. See *In re John Doe Corp.*, 675 F.2d 482, 492-493 (2d Cir. 1982); *In re Grand Jury Investigation*, 599 F.2d 1224, 1232 (3d Cir. 1979). See also Restatement § 138 cmt. c.[48] Petitioners' argument to the contrary is unsupported by law or policy.

[48] The Second Circuit noted that one of the employees had a "hazy" memory and other potential witnesses had invoked the privilege against self-incrimination, so the government had "met its burden of showing a substantial need." 675 F.2d at 492 n.10 & 493. The court permitted discovery of the attorney's notes because "[w]hat is sought is what Employees A and B said, not the attorney's evaluation of potential liability or thoughts as to use at trial." *Id.* at 492. The Third Circuit reached the same conclusion in considering an attorney's memoranda of an interview of a deceased witness. The court found that the grand jury could obtain the attorney's memoranda, in redacted form, because the memoranda were relevant and the government was unable to secure the information from the deceased client directly. 599 F.2d at 1231-1232.

CONCLUSION

The judgment of the court of appeals should be affirmed and the case remanded with directions that an order be entered requiring the district court to compel petitioners to produce forthwith the relevant portions of the July 11, 1993, notes.

Respectfully submitted.

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May 1998

(10)

No. 97-1192

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SWINDLER & BERLIN AND JAMES HAMILTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, when a client dies, the attorney-client privilege in a criminal proceeding is no longer absolute, but is subject to a balancing test that requires the attorney to produce evidence of privileged communications with the client if they "bear on a significant aspect" of the case "as to which there is a scarcity of reliable evidence."

2. Whether, as a matter of law, an attorney's handwritten notes taken during an initial interview with a client do not receive the virtually absolute work product protection otherwise afforded to an attorney's "mental impressions," because at this stage the lawyer "has not sharply focused or weeded the materials" and exercised professional judgment as to what to record.

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INTEREST OF THE AMICUS CURIAE

Amicus curiae, the American Bar Association, has a keen interest in attorney-client confidentiality, which is directly affected by issues involving the scope of the attorney-client privilege and the attorney work-product doctrine.[1] The many members of the ABA who practice law are directly affected by decisions limiting the scope of the privilege and requiring production of communications with their clients, and their client relationships are impaired by such decisions.

The ABA has long taken a leading role in developing standards governing the preservation of client confidences. In 1908, the ABA adopted its Canons of Professional Ethics, providing in Canon 37 that "[i]t is the duty of a lawyer to preserve his client's confidences" and that "[t]his duty outlasts the lawyer's employment." The ABA's Model Code of Professional Responsibility, adopted in 1969, similarly required a lawyer to protect client confidences and secrets both during a representation and after it ended. The Model Rules of Professional Conduct promulgated by the ABA in 1983, which reflect the ABA's current policy, continue to provide that the obligation to preserve confidences remains after the the attorney-client relationship ends. The ABA's Standing Committee on Ethics and Professional Responsibility takes the view that this obligation continues after the client's death.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The ABA recognizes that the ethical obligation to preserve client confidences and the legal protections embodied in the attorney-client privilege and work-product doctrine are related and serve the same general goals. Indeed, without these legal protections, the lawyer's ethical obligation to preserve confidences could be considerably impaired. As Comment [5] to ABA Model Rule 1.6 explains:

> The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

Because of the relationship between the privilege and the ethical principles it reinforces, the ABA takes an interest in important issues involving the scope of the privilege.

In addition, through its Litigation and Criminal Justice Sections, the ABA seeks to define the roles of lawyers in civil and criminal litigation and to improve the civil and criminal justice systems. This case directly implicates these goals. The ABA also seeks, through its Commission on Legal Problems of the Elderly, to improve legal services for the elderly—an objective that has been adversely affected by the decision below, which weakens the attorney-client privilege after the client's death and may have a significant impact on the elderly and others who seek legal services in anticipation of death.

These interests lead the ABA to support the petitioners' position, for the reasons stated below. Both the petitioners and the respondent have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the District of Columbia Circuit marks a substantial departure from the "principles of the common law" as they have historically been "interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. It represents the first time a federal court has ruled that the death of a client so weakens the attorney-client privilege that it may be overcome based on a court's balancing of the government's claimed need for privileged information against the client's interest in confidentiality.

This novel ruling, while directly applicable only to federal criminal proceedings, has the potential to affect attorney-client relationships nationwide and to impair the goals of the ethical principles that require attorneys to protect client confidences. It undermines the certainty of clients and attorneys everywhere that their communications will remain confidential, and it may confound many thousands of persons who, anticipating their own death, seek the advice of attorneys to assist in ordering their affairs.

Indeed, it is fair to assume that hundreds of thousands if not millions of Americans live today—in hospitals, nursing homes, hospices, or in their own homes—in the expectation that they may soon die, whether from disease, old age, or occupational perils, or—like the client in this case—by their own hands. Many of these people undoubtedly have secrets and confidences that, if revealed, would be at the least highly embarrassing to themselves or their friends and loved ones. These might include wrongs done to others by themselves, their friends, or members of their families; hidden assets or financial transactions; or illegitimate children or relationships. Countless other examples could be given.

The attorney-client privilege exists in large part because disclosure to lawyers of confidences such as these enables

people to obtain advice and assistance to guide future actions or to rectify or ameliorate the consequences of past actions. Absent the assurance of confidentiality, such disclosures likely would never be made. The existence and integrity of the attorney-client privilege does not obstruct the truth-finding process. Instead, it promotes disclosure of the truth to lawyers and fosters actions available under the law to redress wrongs that might otherwise be left undiscovered and unaddressed. Decisions such as the one below threaten to impede these important aims.

This is not, it should be emphasized, a case involving the proposed creation of a new privilege, or the expansion of an existing one into hitherto unprotected areas. Such expansions of privilege may be problematic or controversial, *see, e.g., Jaffee v. Redmond*, 116 S. Ct. 1923, 1933 (1996) (Scalia, J., dissenting), and the courts have traditionally stepped carefully in such matters. The issue here, however, is whether a firmly entrenched privilege is to be scaled back through the creation of a new exception wholly at odds with its history and purposes. The burden of establishing that "reason and experience" justify such curtailment of the privilege has not been met, and the Court should not allow the perceived needs of the moment to override the weight of history, tradition and policy that support the privilege.

The lower court's opinion is equally destructive of another critical protection afforded by the law to communications and other materials created by lawyers in the course of representing their clients: the work-product doctrine. Crafted by this Court over the course of half a century, this doctrine helps to protect the adversary system by creating a zone of protection for the mental impressions lawyers develop in anticipation of litigation—*i.e.*, for "opinion work product." Although the attorney notes sought by the Independent Counsel in this case lie at the center of

this protected zone, the D.C. Circuit did not grant them the heightened protection that the work-product doctrine affords such materials. The lower court's rationale for denying the notes such protection rests on an arbitrary distinction between initial client interviews and subsequent interviews conducted by attorneys in anticipation of litigation—a distinction that fails to accord with either reason or the experience of practicing lawyers.

ARGUMENT

I.

THE D.C. CIRCUIT'S NEWLY CREATED EXCEPTION IS AN UNWARRANTED DISTORTION OF THE LAW OF PRIVILEGE

A. The Law of Privilege in Federal Courts Is Based on Common-Law Principles Developed in the Light of Reason and Experience

Federal Rule of Evidence 501 provides that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The Rule, and the privileges whose development it authorizes, applies in both civil and criminal proceedings, including grand jury proceedings. *See* Fed. R. Evid. 1101(b)-(d).[2]

Rule 501 reflects congressional intent that questions of privilege arising in federal proceedings be decided on the basis of "a federally developed common law based on

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[2] *See also In re Grand Jury Investigation*, 918 F.2d 374, 379 (3d Cir. 1990) ("Under Federal Rule of Evidence 1101, Rule 501 is applicable to grand jury proceedings."); *In re Grand Jury Subpoena*, 599 F.2d 504, 509 (2d Cir. 1979) ("It is now clear, however, that discovery by the Government in grand jury proceedings is subject to the attorney-client privilege as developed at common law . . . .") (citing Fed. R. Evid. 1101(c) & (d)).

modern reason and experience." Fed. R. Evid. 501, Advisory Comm. Notes. Consistent with Congress' intent, this Court has recognized that the role of the federal courts under Rule 501 is not to engage in unfettered judicial legislation, but to elaborate rules of privilege within the framework of existing legal principles that together define the prevailing norms of privilege applied by American courts:

> The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience."

Trammel v. United States, 445 U.S. 40, 47 (1980).

In carrying out the evolutionary task set for them by Rule 501, federal courts look to all the sources of guidance traditionally used by courts in articulating common-law rules.

> Both the history and the language of Rule 501 . . . provide us with a mandate to develop evidentiary privileges in accordance with common law principles. This mandate, in turn, requires us to examine federal and state case law and impels us to consult treatises and commentaries on the law of evidence that elucidate the development of the common law.

In re Grand Jury Investigation, 918 F.2d 374, 379 (3d Cir. 1990).

Thus, in its decisions on issues of privilege under Rule 501, this Court has examined prior federal and state case law, *see, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389-93 (1981), as well as scholarly commentary, *see, e.g., Trammel v. United States*, 445 U.S. 40, 50 & n.11 (1980). The Court has also recognized that proposed Federal Rules of Evidence 501 through 513, submitted to Congress but not adopted

when the Rules were approved in 1975, reflect "reason and experience" entitled to significant weight. *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930-31 (1996); *see also United States v. Gillock*, 445 U.S. 360, 367-68 (1980). Similarly, because "the existence of a consensus among the States indicates that 'reason and experience' support recognition of [a] privilege," this Court has recognized that "the policy decisions of the States"—as reflected both in state-court decisions and state legislation—"bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Jaffee*, 116 S. Ct. at 1929-30. In addition, the Court has looked to "accepted norms of professional conduct" (including ABA ethical standards) bearing on confidentiality in determining the extent to which legal protection should be extended to confidential communications. *Nix v. Whiteside*, 475 U.S. 157, 171 (1986).[3]

The use of an incremental, precedent-based approach to resolving issues of privilege has meant that this Court "has rarely expanded common-law testimonial privileges" into new areas, *In re Grand Jury Proceedings*, 103 F.3d 1140, 1149 (3d Cir. 1997) (declining to adopt a parent-child privilege), although the Court has recognized "new" privileges when they have been based on a demonstrable consensus among the relevant sources of authority. *See Jaffee v. Redmond*, *supra* (accepting psychotherapist-patient privilege). By the same token, in recognition that "the long history of [a] privilege suggests that it ought not to be casually cast aside," *Trammel v. United States*, 443 U.S. at 48, the Court has generally protected privileges that are

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[3] *See also Jaffee v. Redmond*, 116 S. Ct. at 1928 & n.9, 1930 n.12 (relying in part on view of professional organizations regarding the need for confidentiality, and on prevailing ethical standards, in recognizing psychotherapist-patient privilege).

"indelibly ensconced in our common law," *United States v. Gillock*, 445 U.S. at 368, and has enforced such privileges as required to carry out their underlying purposes. *See, e.g., United States v. Zolin*, 491 U.S. 554, 562 (1989); *Upjohn v. United States*, 449 U.S. at 390-97.

B. The Attorney-Client Privilege Is Fundamentally Important to Our System of Justice

No privilege is more "indelibly ensconced" in the common law than the attorney-client privilege. This Court has long recognized the significant public policies the privilege serves and its importance to the administration of justice under law:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated ... in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon

> the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

Upjohn Co. v. United States, 449 U.S. at 389; *accord, CFTC v. Weintraub*, 471 U.S. 343, 348 (1985). More succinctly, the Court has stated that the privilege is "rooted in the imperative need for confidence and trust" between lawyer and client. *Trammel v. United States*, 445 U.S. at 51; *accord, Jaffee v. Redmond*, 116 S. Ct. at 1928.

The American Bar Association has similarly emphasized the critical importance of attorney-client confidentiality and has promulgated model ethical standards that reinforce the obligation of confidentiality protected by the privilege. The official comments to Rule 1.6 of the ABA's Model Rules of Professional Conduct describe the policies underlying the ethical requirement of attorney-client confidentiality in terms that parallel those used by this Court in *Upjohn*:

> [2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
>
> [3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

> [4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

C. The Common Law Recognizes that the Privilege Survives the Client's Death

The attorney-client privilege and the parallel ethical obligation to preserve client confidences traditionally have not been thought to be temporally limited. Comment 22 to the ABA's Model Rule 1.6 expresses the general principle: "The duty of confidentiality continues after the client-lawyer relationship has terminated." Judicial formulations of the privilege have long expressed a similar view. In an influential early opinion, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts wrote:

> The principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal advisor and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts *the mouth of the attorney shall be for ever sealed.*

Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1834) (emphasis added).

Justice David Brewer put the matter similarly in an opinion written shortly before his appointment to this Court:

> [I]t is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that *that lawyer's tongue is tied from ever disclosing it* . . . .

United States v. Costen, 38 F. 24 (C.C.D. Colo. 1889) (emphasis added).

The late Judge Irving Kaufman expressed the same principle in his much-cited opinion in *United States v. Standard Oil Co.*, 136 F. Supp. 345, 355 (S.D.N.Y. 1955):

> The confidences communicated by a client to his attorney must remain inviolate for all time if the public is to have reverence for the law and confidence in its guardians. It is traditional in the legal profession that the fidelity of a lawyer to his client can be depended upon. The client must be secure in his belief that the lawyer will be forever barred from disclosing confidences reposed in him.

The view that the privilege does not lapse with time is reflected in a consistent body of federal and state caselaw holding that the privilege survives the death of the client. As one author has summarized the rule:

> [T]he privilege, once it attaches, persists unless the lawyer is released by the client. Upon the death of the client, no release is possible. Hence death should seal the lawyer's lips forever.[4]

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[4] EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 234 (ABA Sec. of Litigation 3d ed. 1997); *accord* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED

The same view has found expression in the proposed final draft of the American Law Institute's Restatement (Third) of the Law Governing Lawyers, which states that "[t]he privilege survives the death of the client";[5] in Dean Wigmore's treatise, which says that "the privilege continues even after the *end of the litigation* or other occasion for legal advice and even after the *death of the client*";[6] in Judge Weinstein's treatise on evidence, which expresses "the general rule that the lawyer-client privilege survives the death of the client";[7] in Professors Hazard's and Hodes's treatise on *The Law of Lawyering*, which states that "since confidentiality (and the attorney-client privilege) are designed as inducements to speak at the time of the client-lawyer consultation, it is almost universally held that the lawyer's duty to maintain silence survives not only the relationship but also the death of the client";[8] and in this Court's proposed Federal Rule of Evidence 503, which would have provided for the survival of the privilege after the client's death.[9]

The ABA's Ethics Committee summarized the rationale for the survival of the privilege in its Informal Opinion 1293:

STATES § 2:5, at 69 (Law. Coop. 1997) ("In all circumstances, other than the will contest exception, the privilege survives the death of the individual client . . . .").

[5] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, cmt. c, at 431 (Proposed Final Draft No. 1 1996); *see also id.* § 112, cmt. e, at 280 ("The duty of confidentiality continues so long as the lawyer possesses confidential client information. It extends beyond the end of the representation and beyond the death of the client.").

[6] 8 J. WIGMORE, EVIDENCE § 2323, at 631 (McNaughton rev. 1961).

[7] 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.32, at 503–96 (2d ed. 1997).

[8] 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.6:101, at 131 (1998).

[9] *See* PROPOSED FED. R. EVID. 503(c) ("The privilege may be claimed by . . . the personal representative of a deceased client . . . .").

> [T]here is no rule or reason to say that any such confidences and secrets should not be preserved indefinitely. Any other rule would mean that promptly upon the death of a client the privilege would be annulled and the attorney would be at liberty to disclose information which had been confided in him by the client while alive. This, to say the least, could lead to numerous serious problems involving the client's representatives, surviving relatives and business associates. Such a concept would be in contravention of the very purpose of the privilege.[10]

The general principle of survival of the privilege has long been viewed as having one exception: the so-called "will contest" exception, under which attorney-client communications relating to estate planning matters are not privileged if "sought to be disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client." *United States v. Osborn*, 561 F.2d 1334, 1340 (9th Cir. 1977); *see also Glover v. Patten*, 165 U.S. 394, 408 (1897). The exception has been narrowly confined to these circumstances, in which it is "necessary to a proper fulfillment of the testator's intent." *Osborn*, 561 F.2d at 1340, n.11; *see also Hitt v. Stephens*, 675 N.E.2d 275 (Ill. App. 1996) (declining to expand exception to situation where there was no pending litigation contesting a will), *appeal denied*, 679 N.E.2d 380 (Ill. 1997). Outside of the will contest situation, traditionally there has been no exception to the privilege's survival. "The only context in which a client's death might affect the viability of the privilege is a will contest." *Hitt*, 675 N.E.2d at 278. Or, as one leading treatise puts it, "[a] will contest is the *only*

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[10] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1293 (1974) (Maintenance of Confidences and Secrets of a Deceased Client).

exception to the general rule that the privilege survives the death of a client."[11]

D. The Lower Court's Revision of Privilege Law Fails to Comport with Reason and Experience

1. "Balancing Tests" Are Inimical to the Purposes of the Privilege

Although the D.C. Circuit's opinion does not purport to abrogate the privilege altogether upon the client's death, it fundamentally transforms the privilege by subjecting it to a court's balancing of the need for the information against the interests served by confidentiality. The D.C. Circuit's ruling is a departure from the ordinary rule that the attorney-client privilege, unlike privileges or protections that are qualified, "'cannot be overcome by a showing of need.'"[12] It is black-letter law that "[a]bsent a waiver of the protection, . . . the privilege precludes the disclosure of the communications regardless of the need that might be demonstrated for the

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[11] RICE, *supra*, § 2:6, at 70 (emphasis added); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, cmt. d, at 431 (Proposed Final Draft No. 1 1996) (except for the will contest exception, "[t]he law recognizes no exception to the rule" that the privilege survives); *id.* § 127, Reporter's note to cmt. c (outside the will contest exception, "other cases are encountered and they routinely hold that the privilege survives").

[12] *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989) (quoting Saltzburg, *Corporate and Related Attorney-Client Privilege: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 299 (1984)); *see also In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2d Cir. 1979) (noting that attorney-client privilege is not a qualified privilege subject to a balancing test); *Mason C. Day Excavating, Inc. v. Lumbermens Mut. Cas. Co.*, 143 F.R.D. 601, 609 (M.D.N.C. 1992) ("Unlike work product protection, under . . . federal common law . . . , the attorney-client privilege does not implicate a balancing test wherein the privilege may be disregarded solely because the opposing party can show a sufficient need for the information.").

information in them."[13] As the proposed final draft of the Restatement puts it, "the privilege . . . is not subject to ad hoc exceptions" based on balancing.[14]

Indeed, this Court has observed that making the protection of a confidential communication dependent upon such a balancing test "would eviscerate the effectiveness of the privilege." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996). The predictable effect of a balancing analysis will be for a court to give preference to the needs of a party to the matter immediately at hand over the interests of an individual who is deceased and the more generalized policy interests of society in fostering attorney-client confidences. In *Jaffee*, this Court rejected a balancing test for the newly recognized psychotherapist-patient privilege for just such reasons. Here, where what is at issue is a long-established privilege that has *never* been subject to a balancing test, it is even clearer that considerations of "reason and experience" counsel against limiting the privilege by adopting an ad hoc balancing approach.

2. The Attorney-Client Privilege Should Not Be Curtailed in Criminal Proceedings

To be sure, the D.C. Circuit states that its balancing approach will apply only in criminal or grand jury proceedings. But the lower court's creation of different privilege rules to be applied in criminal and civil matters, far from justifying its weakening of the privilege, is itself profoundly troubling. The Rules of Evidence do not distinguish among civil, criminal, and grand jury matters for purposes of applying evidentiary privileges; rather, they expressly provide that privileges recognized under Rule 501

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[13] RICE, *supra*, § 2:2, at 50 (footnotes omitted).

[14] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118, cmt. c, at 341 (Proposed Final Draft No. 1 1996).

apply fully in all proceedings. Fed. R. Evid. 1101. Indeed, the Advisory Committee Notes to Rule 501, prepared by the House-Senate Conference Committee that devised the final version of the Rule, emphasizes that the intent of the Rule was "that privileges shall continue to be developed by the courts of the United States *under a uniform standard applicable both in civil and criminal cases*" (emphasis added).

The D.C. Circuit's suggestion that the attorney-client privilege should be subject to a different standard in criminal and civil matters is a marked departure not only from congressional intent, but also from the traditional refusal of American courts to draw such a distinction. Although the decision below is on its face limited to the situation where the privilege is invoked after the death of the client, the notion that criminal and civil cases are different in kind with respect to the attorney-client privilege may not, once accepted, be easily cabined. The D.C. Circuit's decision thus stands as a troubling threat to the hitherto unquestioned rule that the attorney-client privilege is fully applicable to criminal and grand jury matters.

3. The Existence of One Carefully Defined Exception to the Survival of the Privilege Does Not Justify Creating New Exceptions Contrary to the Policies Underlying the Privilege

The existence of another, longstanding exception to the survival of the privilege—the will contest exception—cannot support the creation of a new one applicable to an entirely distinct set of circumstances. Unlike the D.C. Circuit's newly crafted rule, the existing exception is supported by over one hundred years of precedent reflecting the "reason and experience" of common law courts. Moreover, the will contest exception is based on considerations that make it extremely unlikely that it will undermine the purposes of the

privilege. As courts and scholars unanimously acknowledge, the exception is designed to effectuate the intention of the testator, and is based on the view that "a decedent would (if one could ask him) waive the privilege in order that the distribution scheme he actually intended be put into effect." *Hitt v. Stephens*, 675 N.E.2d at 278.[15] Under such circumstances, as this Court long ago recognized, disclosure "can present no impediment to a full statement to the [attorney]." *Blackburn v. Crawford's Lessee*, 70 U.S. at 193. The existence of an exception for disclosures consistent with the wishes of a decedent can in no way support creation of an exception allowing disclosures *contrary* to the decedent's intentions, for the latter, unlike the former, would naturally tend to chill attorney-client communications and thus defeat the purpose of the privilege.

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[15] *See also Glover v. Patten*, 165 U.S. at 408; *Blackburn v. Crawford's Lessee*, 70 U.S. 175, 194 (1866); *United States v. Osborn*, 561 F.2d at 1340, n.11; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 131, cmt. b, at 458 (Proposed Final Draft No. 1 1996) (the will contest exception is "justified on the ground that the decedent would have wished full disclosure to facilitate carrying out the client's intentions. . . . It is therefore probable that the exception does little to lessen the inclination to communicate freely with lawyers."). As the Independent Counsel has noted, it is of course not always the case that a client would consent to the disclosure of privileged communications on all matters relating to estate planning, for estate planning "may be based on considerations one would prefer never to reveal." *Hitt v. Stephens*, 675 N.E.2d at 279. But this is precisely why the courts have not created a general estate planning exception, and have confined the will contest exception to those circumstances where it is most likely that disclosure will be consistent with the decedent's wishes. *See id.* at 278-79.

4. The Lower Court's Reasoning Unduly Discounts the Chilling Effect Its Rule Will Have on Attorney-Client Communications

The D.C. Circuit justifies its substantial weakening of the privilege by its conjecture that the prospect of revelation of attorney-client confidences in criminal matters after the client's death will have little effect on the willingness of clients to confide in attorneys. Common experience—and in particular the experience of members of the ABA and other practicing lawyers—suggests that the D.C. Circuit's supposition is, at best, highly speculative. Every day, thousands of clients consult their attorneys with the object of ordering their affairs and providing for their families and loved ones in the event of their death—consultations that would not occur if clients were truly indifferent to what happened after they died.

While acknowledging that clients regularly show great concern for the effect of events after their death on the pecuniary well-being of their heirs, the D.C. Circuit nonetheless held that *criminal* matters will rarely implicate interests that will survive a client's death. The court reasoned that, by definition, the client cannot be held criminally liable after death, and it apparently assumed that the client will have little concern about the possible criminal liability of others. Moreover, the court discounted the client's possible concern with the effect of a criminal matter on his or her own reputation after death, stating that only a client with a near-Pharaonic interest in immortality would be concerned with such matters.

The court's reasoning is curious. We know that clients regularly show vital concern for their families' material well-being after their death. Why should we assume they would be less concerned about the possibility that their friends and

loved ones might face criminal penalties?[16] Moreover, even if the odd notion that people care more about their survivors' financial interests than about whether they may be prosecuted and imprisoned were true, criminal matters often have extraordinarily grave financial consequences for their subjects (and their subjects' families). A client aware that an attorney-client confidence could be disclosed to a prosecutor or grand jury after the client's death could have great reason to fear that the result would be substantial fines and forfeitures that could ruin members of the client's family—even, possibly, family members innocent of any crime. *Cf. Bennis v. Michigan*, 516 U.S. 442 (1996).

As for the supposition that the concern of clients for their reputation after their death is so slight that the prospect of disclosure will not chill attorney-client communications, it, too, seems contrary to reason and experience. The maxim that "a good reputation is more valuable than money" has survived for centuries.[17] The consciousness that reputation lives on after death is evident not only in the works of memoirists and philanthropists, but in the efforts of ordinary men and women down to their last days to maintain the good regard of their friends and neighbors.[18] The depth of this

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[16] *Cf.* FED. R. EVID. 804(b)(3) (equating statements against pecuniary interest with statements against penal interest for purposes of applying hearsay rules).

[17] PUBLIUS SYRUS, MAXIM 108 (42 B.C.).

[18] To cite only one example, President Grant—hardly a man of Pharaonic immodesty—spent the last months of his life in a successful race to complete his memoirs before he died of cancer, not only in order to secure his reputation for posterity, but also to provide the wherewithal for his family to extricate itself from the financial and legal difficulties into which he had brought it. E.B. Long, *Introduction* to ULYSSES S. GRANT, PERSONAL MEMOIRS OF U.S. GRANT, xx–xxii (1952) (Da Capo Press reprint 1982).

concern is captured by Cassio's lament from *Othello*, act 2, scene 3:

> Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial.

5. The Independent Counsel's Alternative "Exposure of Client Perjury" Rationale for the Result Below Is Unconvincing

In his Brief in Opposition to the Petition for Certiorari, the Independent Counsel presents an alternative argument for abrogation of the privilege in this case, based on the assertion that permitting disclosure would provide the Independent Counsel with no more information than he could have obtained if the client were still alive. The Independent Counsel contends that the facts he seeks to discover from the attorney could have been learned directly from the client if he were alive by immunizing him and calling him as a grand jury witness. If the client had then testified inconsistently with what he had told the attorney, the Independent Counsel asserts, the attorney would have been ethically obligated to reveal the confidences anyway. Thus, the Independent Counsel asserts, requiring disclosure cannot have any adverse effect on the policies underlying the privilege.

The Independent Counsel's argument is wrong on multiple levels. Under the District of Columbia's ethical rules (unlike the ABA's Model Rules), even perjury by the client in open court while represented by the attorney would not permit the attorney to disclose confidences. *Compare* D.C. Rule Prof. Conduct 3.3(b) & (d) (and Comments [6] & [7]) *with* ABA Model Rule 3.3(a)(2) & (4) (and Comments [5]-[12]).[19] Moreover, even if Mr. Foster were alive, the

[19] In any event, neither the Model Rules nor the leading ABA Ethics Committee opinion on the subject of client perjury would require an attorney to disclose perjury given by his client before a grand jury if he learned of it after the fact, which would be the situation under the Independent Counsel's hypothetical if the client were alive and he, instead of his attorney, were subpoenaed and testified falsely about the subjects on which he had conferred with his attorney. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-353, at 2-3 & n.3 (1987) (Lawyer's Responsibility with Relation to Client Perjury).

Independent Counsel could not obtain from him directly what he now seeks from Mr. Foster's lawyer. The Independent Counsel could, of course, ask questions eliciting recollections of particular underlying facts, but he could not simply ask Mr. Foster to "tell the grand jury everything you told your lawyer"—which is what he is now, in effect, asking the lawyer. Thus, the Independent Counsel's premise that the information he now seeks from the attorney would have been available from the client during his lifetime (with the lawyer as a backup in case of perjury) is incorrect.[20]

More fundamentally, the Independent Counsel's argument focuses on the wrong issue. The question is not whether the Independent Counsel will be able to learn more from the attorney if the D.C. Circuit's new rule is adopted than he could have learned from the client if he were still alive. Rather, the relevant question is whether *protection* of the confidences would *deprive* the Independent Counsel of any information that would have been available to him *if the attorney-client communication had never taken place*. Of course, if the communication had never occurred, the client's death would have prevented the Independent Counsel from seeking the information from its original source. Thus, as in *Upjohn*, the privilege should be sustained, because "[a]pplication of the attorney-client privilege to

[20] The Independent Counsel's position recalls a line from T.S. Eliot: "[W]hat the dead had no speech for, when living,/ They can tell you, being dead." T.S. ELIOT, FOUR QUARTETS, *Little Gidding*, in THE COMPLETE POEMS AND PLAYS 1909-1950, 115, 139 (1952).

communications such as those involved here, . . . puts the adversary in no worse position than if the communications had never taken place." 449 U.S. at 395.

Finally, the Independent Counsel's argument "proves too much, since it applies to all communications covered by the privilege." *Id.* at 393, n.2. If, as the Independent Counsel suggests, an attorney's obligation (in some jurisdictions) to expose perjury by his client is a reason for eliminating the privilege after death, it would seem equally valid as a reason for eliminating the privilege altogether, and simply going to the attorney for information in the first instance, eliminating the unnecessary middle step of putting the client on the stand and using his attorney as a check on his testimony. The ABA has taken a strong position on a lawyer's ethical obligation not to be a party to client perjury, *see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-353 (1987); *see also Nix v. Whiteside*, 475 U.S. 157 (1986), but that obligation cannot be bootstrapped into an argument for eliminating the privilege when there has been no perjury.

This Court has recognized that "[a]s a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Notwithstanding the Independent Counsel's protestations, denying the protection of the privilege to the communications at issue here would have precisely that effect. Absent disclosure to the attorney, the client would have been assured that his death would seal his secrets. Thus, denying the privilege after death would necessarily make the information "more readily obtained from the attorney following disclosure" than it would have been from the client absent the disclosure. The policies

underlying the privilege thus require its application, and there is no basis for eliminating it simply to relieve the Independent Counsel from the ordinary consequence of the death of a witness—loss of the witness' testimony.

E. The Lower Court's Opinion Is Likely to Have a Far-Reaching Negative Impact on Attorney-Client Communications

The resolution of the privilege issue in this case, although it technically will apply only in federal proceedings, will have a far larger practical impact. Given the scope of federal criminal investigations, clients throughout the country will have reason to fear that their confidences might someday become relevant to federal criminal proceedings before grand juries or courts. Even though client confidences may be fully protected under the law of the state in which they are made, the D.C. Circuit's new federal rule would negate those protections in a federal criminal proceeding.[21] For exactly this reason, this Court has recognized the undesirability of federal privilege rules that have the effect of frustrating the purpose of state-law rules that foster socially valuable confidential communications. *Jaffee v. Redmond*, 116 S. Ct. at 1930.

If the D.C. Circuit's ruling is sustained, conscientious attorneys everywhere will advise their clients—regardless of whether their death may seem imminent—that they should assume their communications will *not* remain confidential after they die. A cautious client may well respond by withholding information that is necessary to effective representation by the lawyer. To be sure, the degree to which attorney-client confidences may be chilled by the creation of this or any other exception to the privilege cannot be

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[21] *See* FED. R. EVID. 501 (providing that federal common law of privilege governs in federal courts except where state law provides the substantive rule of decision on a claim or defense in a civil action).

measured; but this Court has never demanded proof that disclosure will have a quantifiable adverse effect. *See, e.g.*, *Upjohn*, *supra*; *Jaffee v. Redmond*, *supra*. It suffices that the same "reason and experience" that led to the recognition of the privilege in the first instance indicate that it should remain applicable to the communications at issue here.

There are undoubtedly many thousands of people who live in the expectation of death and who want, and would benefit from, legal advice about matters that are personally embarrassing at the least and that might have even more serious consequences for surviving loved ones and friends. As Judge Tatel correctly observed in his dissenting opinion, the assurance of confidentiality that can be given by lawyers to such clients under the rule adopted by the panel below is tenuous. Indeed, even clients who have no particular reason to believe that they will soon die must, under the D.C. Circuit's ruling, contemplate the possibility that their confidences may be revealed in the event of their death, which, even if not imminent, is certainly inevitable. Mindful that "[a]n uncertain privilege . . . is little better than no privilege at all," *Upjohn*, 449 U.S. at 393, this Court should reject the D.C. Circuit's new exception.

In sum, the D.C. Circuit's newly created exception to the attorney-client privilege is consistent neither with settled precedents nor with any discernible "current trends in the law," *United States v. Zolin*, 491 U.S. 554, 570 (1989), and it would "place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk." *Id.* at 571. This Court should therefore "decline to adopt it as part of the developing federal common law of evidentiary privileges," because it "does not comport with 'reason and experience.'" *Id.* at 574.

II.

THE COURT OF APPEALS ERRED IN DENYING OPINION WORK-PRODUCT STATUS TO ATTORNEY NOTES OF STATEMENTS MADE IN AN INITIAL CLIENT CONSULTATION

The D.C. Circuit's equally unprecedented denial of opinion work-product protection to an attorney's notes of an initial client interview fundamentally misconceives this Court's precedents concerning the work-product doctrine, by arbitrarily singling out a subset of the category of core, opinion work product and denying it the heightened protection to which it is entitled under longstanding decisions of this Court.

The Court has repeatedly emphasized "'[t]he strong public policy' underlying the work-product doctrine." *Upjohn*, 449 U.S. at 398. The policy was fully articulated in the Court's opinion in *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947):

> In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed . . . the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own.

The work-product doctrine originated in the civil discovery dispute decided by the Court in *Hickman*, and it has been most fully codified in the discovery provisions of the Federal Rules of Civil Procedure. But it is equally applicable—and perhaps more critically important—in federal criminal matters. As the Court explained in *United States v. Nobles*, 422 U.S. 225, 238 (1975):

> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.[22]

Consistent with *Hickman*'s emphasis on maintaining the attorney's thoughts "inviolate," the work-product doctrine provides special protection for "opinion work product"—work product that reveals the attorney's own thoughts. "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Nobles*, 422 U.S. at 238. Work product in this core area, unlike non-opinion work product, "cannot be disclosed simply on a showing of

[22] *Nobles* concerned the application of the work-product doctrine in a federal criminal trial. It is equally "clear that discovery by the government in grand jury proceedings is subject to the work-product protection." EPSTEIN, *supra*, at 295; *see also, e.g.*, *In re Sealed Case*, 676 F.2d 793, 810-11 (D.C. Cir. 1982) (holding work-product doctrine applicable in grand jury proceedings); *In re Grand Jury Investigation*, 599 F.2d 1224, 1228 (3d Cir. 1979) (same); *In re Grand Jury Subpoena*, 599 F.2d 504, 509 (2d Cir. 1979) (same); *In re Grand Jury Proceedings*, 473 F.2d 840, 842-43 (8th Cir. 1973) (same).

substantial need and inability to obtain the equivalent without undue hardship." *Upjohn*, 449 U.S. at 401.

Notes of an attorney's interviews with witnesses have long been at the heart of this Court's definition of opinion work product. As the Court explained in *Upjohn*, "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes . . . ." 449 U.S. at 399. In a much-cited passage in his concurring opinion in *Hickman*, Justice Jackson noted that compelling disclosure of such notes, reflecting the attorney's "language, permeated with his inferences," would be "demoralizing to the Bar" in the extreme. 329 U.S. at 516–17. Thus, the Court held in *Upjohn*, "[i]t is clear that this is the sort of material . . . deserving special protection." 449 U.S. at 400.

The D.C. Circuit majority sought to evade this principle by creating a special exception for notes of an initial client interview. But the court's view that such writings—unlike notes of other witness interviews—reflect few of the attorney's own thoughts and opinions does not accord with the experience of practicing lawyers. The court's conception of the lawyer as merely a passive recipient of information in an initial interview misses the mark. Experienced practitioners recognize the initial interview as a critical stage in the representation of the client, in the course of which a skillful lawyer plays an important role in eliciting pertinent information and beginning to give shape to the goals and strategies to be pursued in the matter.[23]

This Court emphasized in *Upjohn* that "*[t]he first step* in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the

[23] *See* FRED LANE, LANE GOLDSTEIN TRIAL TECHNIQUE § 1.03, at 3 (3d ed. 1997).

legally relevant." 449 U.S. at 390-91 (emphasis added). Accordingly, lawyers in the initial interview begin to "assess[] the truth and accuracy of a client's story based upon her comments, manner, delivery and gestures,"[24] guide the discussion toward facts and issues they perceive to be relevant, and discuss possible alternative courses of action to be pursued. A good lawyer's conduct of such an interview reflects recognition that "[t]he initial interview can set the tone for the entire case,"[25] and that the objective is "to identify the client's hidden agenda" so that the lawyer may "address the most critical matters immediately and design [the lawyer's] overall approach around the client's particular needs."[26] The lawyer's notes taken in this process necessarily reflect not only the way he or she has helped shape the interview, but also the lawyer's professional judgment about the relative importance of the various subjects discussed.

The D.C. Circuit's denial of opinion work-product status to the notes in this case thus represents a significant breach in the protection afforded to lawyers' thoughts and mental impressions formed in anticipation of litigation. A predictable result of such a rule would be, as the Court observed in *Hickman*, that "much of what is now put down in writing would remain unwritten." 329 U.S. at 511. Moreover, there is no guarantee that a rule making such materials readily discoverable would stop at written notes. Indeed, if the Independent Counsel is successful in obtaining counsel's notes, can anyone doubt that the next step will be a subpoena directing the attorney to appear before the grand jury to

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[24] LANE, *supra*, §1.07, at 5.

[25] NOELLE C. NELSON, CONNECTING WITH YOUR CLIENT 1 (ABA Sec. of Law Practice Management 1996).

[26] STANLEY S. CLAWAR, YOU & YOUR CLIENTS: A GUIDE TO CLIENT MANAGEMENT SKILLS FOR A MORE SUCCESSFUL PRACTICE 3 (ABA Gen. Practice Sec. 2d ed. 1996).

identify them, explain and interpret them, vouch for their accuracy, and add his own recollections and mental impressions of what his client told him in the interview? It is difficult to perceive a logical stopping-point to the probing of the attorney's mental impressions once it has begun.

Again, Justice Jackson's words aptly capture the potential impact of such an inquest into the lawyer's thoughts:

> The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice . . . secondarily but certainly.

Hickman v. Taylor, 329 U.S. at 514–15 (Jackson, J., concurring).

CONCLUSION

The issues decided in the court below are of grave concern to the legal profession. As one observer has written:

> Lawyers fret that the protections of the attorney-client privilege and the work-product immunity are being eroded. The fear is hardly surprising. Of all the evidentiary and discovery rules, these two go to the heart of both the lawyer's relationship with a client and the lawyer's jealously guarded right to develop

litigation strategies without fear of compelled disclosure to an adversary.[27]

Ultimately, however, the interests at issue are not those of lawyers, but of their clients, whose legitimate right to obtain legal services the privilege and the work-product doctrine are designed to protect. The decision of the D.C. Circuit in this case substantially erodes the scope of the attorney-client privilege and work-product protections as applied in the federal courts, with significant practical consequences for attorneys and their clients nationwide. This Court should restore the proper balance by reversing the decision of the court of appeals.

Respectfully submitted,

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[27] EPSTEIN, *supra*, at 450.

No. 97-1192

In the Supreme Court of the United States

OCTOBER TERM, 1997

SWIDLER & BERLIN, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN CORPORATE COUNSEL ASSOCIATION, NATIONAL HOSPICE ORGANIZATION, TRIAL LAWYERS FOR PUBLIC JUSTICE, AND AMERICAN PSYCHIATRIC ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members throughout the United States. Founded in 1958, NACDL seeks to promote the effective representation of defendants in criminal cases. The attorney-client and work-product issues in this case are central to NACDL's

[1] The parties have consented to the filing of this brief under S. Ct. R. 37.2, and their letters of consent have been lodged with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

members and their clients. NACDL has appeared as amicus curiae in several cases in this Court. See, *e.g.*, *Almendarez-Torres* v. *United States*, 118 S. Ct. 1219 (1998); *Hudson* v. *United States*, 118 S. Ct. 488 (1997); *Moran* v. *Burbine*, 475 U.S. 412 (1986).

The American Corporate Counsel Association is a non-profit national bar association for in-house corporate counsel. Since its founding in 1982, ACCA has grown to more than 10,600 members in approximately 4,600 corporations and other private-sector organizations. The attorney-client and especially the work-product issues presented in this case are of direct concern to ACCA's members and the clients they represent. ACCA has participated as *amicus curiae* in a number of cases before this Court. See, *e.g.*, *Virginia Bankshares* v. *Sandberg*, 501 U.S. 1083 (1991); *Frazier* v. *Heebe*, 482 U.S. 641 (1987).

The National Hospice Organization is a non-profit, public-benefit, charitable organization dedicated to meeting the unique needs of terminally ill people and their families. Established in 1978, NHO represents approximately 2,400 hospice programs, some 4,000 hospice professionals, and 48 state hospice organizations. In addition to the physical, spiritual, social, and emotional care and support provided by hospices, people in the final stage of life often need legal services, and the attorney-client issue in this case therefore is of particular concern to NHO, its members, and those they serve. NHO has previously appeared as *amicus curiae* in this Court. See, *e.g.*, *Vacco* v. *Quill*, 117 S. Ct. 2293 (1997); *Washington* v. *Glucksberg*, 117 S. Ct. 2258 (1997); *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

Trial Lawyers for Public Justice, P.C., is a national public-interest law firm devoted to the improvement of our nation's laws and system of justice. Founded in 1982, TLPJ is now supported by a nationwide network of more than 1,500 attorneys. TLPJ believes that the decision below threatens our justice system by undermining the attorney-client and work-product privileges. TLPJ has previously participated as *amicus curiae* in several cases before this Court. See, *e.g.*, *Amchem Products, Inc.* v. *Windsor*, 117 S. Ct. 2231 (1997); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996).

The American Psychiatric Association has participated in numerous cases in the Court, including *Jaffee* v. *Redmond*, 116 S. Ct. 1923 (1996), which recognized the psychotherapist-patient privilege. The privileged nature of patient communications is a basic tenet of psychiatry. APA's members, and their patients, have a strong interest in ensuring that the *Jaffee* privilege not be weakened by disclosures after a patient's death, which would upset patients' expectations and impair the important purposes served by the privilege.

SUMMARY OF ARGUMENT

I. The court of appeals' decision that the absolute attorney-client privilege does not survive the death of the client is unprecedented and contrary to the settled understanding of the bench and bar. Although the ruling below is framed as a purported exception to the general rule, the panel's reasoning in fact is flatly inconsistent with the fundamental premises of the basic privilege itself. Moreover, the majority grossly underestimated the chilling effect of posthumous disclosure on clients' willingness to communicate fully and forthrightly with their lawyers. In the light of "reason and experience" (Fed. R. Evid. 501), an absolute rather than qualified posthumous privilege is necessary to serve the time-honored purpose of the attorney-client privilege: to facilitate legal representation by encouraging complete candor and truthfulness on the part of clients.

II. Contrary to the court of appeals' decision, the stringent protection for a lawyer's mental-impression work product applies to his notes of a preliminary meeting with a client. No less at an initial meeting than at any other, what the lawyer elicits from the client, as well as what he elects to record and the language he uses to do so, all reflect the exercise of the lawyer's professional judgment and reveal his (or her) mental processes. Accordingly, the court below erred in applying the lax work-product standard applicable to purely factual information, rather than the more stringent standard for mental-impression work product, to allow the disclosure of factual material in the lawyer's notes that reveal his thoughts and legal strategies. A contrary rule would discourage

counsel from taking notes and interfere with effective legal representation.

ARGUMENT

A divided panel of the D.C. Circuit, over the vigorous dissent of Judge Tatel, incorrectly decided two issues involving the attorney-client and work-product privileges that are of surpassing importance to our adversarial system of justice and to the legal profession and the clients it represents. Both of the panel's rulings are unprecedented and conflict with an unbroken line of decisions of this and other courts over many decades. Moreover, the issues presented are recurring ones for the legal system and arise routinely in the practice of law. As Judge Tatel explained, the majority's "two new holdings—one chilling client disclosure, the other chilling lawyer note-taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process." Pet. App. 32a–33a (Tatel, J., dissenting from denial of rehearing in banc). Because the panel's rulings are fundamentally misconceived under "the principles of the common law as * * * interpreted * * * in the light of reason and experience" (Fed. R. Evid. 501), the decision below should be reversed.

I. THE ABSOLUTE ATTORNEY-CLIENT PRIVILEGE SURVIVES THE DEATH OF THE CLIENT.

In this case, the Independent Counsel obtained grand-jury subpoenas for notes of a meeting between James Hamilton, a private attorney, and his client, Vincent W. Foster, Jr., who was then a White House official and who, nine days after the meeting, committed suicide. It is common ground in this case that their discussion, when it occurred, was covered by the attorney-client privilege. Pet. App. 2a. Thus, the notes of the meeting were subject to subpoena only because the court of appeals held that the death of the client qualifies what would otherwise be an absolute privilege and that an *ad hoc* balancing test determines whether the post-death qualified privilege is outweighed by the need for the material in the criminal investigation.

The court of appeals' decision cannot withstand analysis. Much of the court's reasoning is flatly inconsistent with the settled

understanding of the attorney-client privilege. Moreover, none of the reasons advanced by the majority remotely justifies a departure from the established rule, endorsed by courts and legislatures alike, that the privilege survives the death of the client.

The court of appeals' decision, if upheld by this Court, will adversely affect the legal system on a regular and even daily basis. Most directly, it will be felt, as here, when material or information is sought to be compelled after the death of the client. By itself, that is a significant and recurring consequence. But the decision also will come to bear *every time* a lawyer counsels a client on the privileged nature of their communications and a client must decide, in light of the privilege available, whether to make a full and candid disclosure to his lawyer of the most highly incriminating, embarrassing, or otherwise sensitive facts the client possesses. As Judge Tatel aptly observed in dissent (Pet. App. 20a–21a), the attorney no longer can provide assurance that proper attorney-client communications (that is, not in furtherance of a crime or fraud) will be absolutely privileged, but instead must give much more complex and qualified advice that the privilege ultimately depends upon a *post-hoc* and free-form balancing test that will turn on circumstances that cannot then be foreseen. The result of the court of appeals' decision is to confront clients—who already are facing some legal problem for which they are seeking professional assistance—with uncertain and confusing advice about the privilege that in the end can be little more than cold comfort. The ruling thus has an immediate and direct effect on the everyday practice of law and the routine decisions that clients make, and it unavoidably will deter candid client disclosures that, until now, were encouraged by the absolute attorney-client privilege.

A. An Absolute Attorney-Client Privilege Serves To Encourage Complete And Candid Communications By Clients, And The Common Law And Evidence Codes Recognize That The Privilege Does Not Abate Upon The Death Of The Client.

As this Court has recognized, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The fundamental purpose of the privilege

"is to encourage full and frank communications between attorneys and their clients"; it "'rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out'" and is essential to enable the client to be free "'to make full disclosure to their attorneys.'" *Ibid.* In this way, the privilege "'promote[s the] public interests in the observance of law and administration of justice.'" *Ibid.* In sum, the privilege reflects both that "sound legal advice or advocacy serves public ends," and that "such advice or advocacy depends upon the lawyer's being fully informed by the client * * * [which will occur only when the client is] 'free from the consequences or the apprehension of disclosure.'" *Ibid.* See also *Jaffee* v. *Redmond*, 116 S. Ct. 1923, 1928 (1996) (the attorney-client privilege is "'rooted in the imperative need for confidence and trust,'" and "the mere possibility of disclosure * * * [that] may cause embarrassment or disgrace * * * may impede development of the confidential relationship"); *United States* v. *Zolin*, 491 U.S. 554, 562 (1989).

With striking uniformity, the law long has recognized that the absolute attorney-client privilege continues after the death of the client. As Judge Tatel demonstrated in detail below, "[s]ince at least the mid-nineteenth century, the common law has protected the attorney-client privilege after a client's death" (Pet. App. 17a), and courts and legislatures consistently have adhered to that principle. This Court has ruled that the privilege survives the client's death,[2] as have lower federal courts[3] and state courts[4] as well as

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[2] See *Glover* v. *Patten*, 165 U.S. 394, 406–408 (1897). See also *Chirac* v. *Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826) (Story, J.) ("confidential communications between client and attorney, are not to be revealed at any time"); *Blackburn* v. *Crawfords*, 70 U.S. (3 Wall.) 175, 192–194 (1865).

[3] See, *e.g.*, *United States* v. *Osborn*, 561 F.2d 1334, 1340 (9th Cir. 1977); *Baldwin* v. *CIR*, 125 F.2d 812, 814 (9th Cir. 1942); *United States* v. *Costen*, 38 F. 24, 24 (C.C.D. Colo. 1889) (attorney-client privilege provides "the absolute assurance that that lawyer's tongue is tied from ever disclosing [the client's communication.]"); *Dixson* v. *Quarles*, 627 F. Supp. 50, 53 (E.D. Mich.), aff'd mem., 781 F.2d 534 (6th Cir. 1985), cert. denied, 479 U.S. 935 (1986).

[4] See, *e.g.*, *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 70–72 (Mass. 1990); *Hatton* v. *Robinson*, 31 Mass. (14 Pick.) 416, 422 (1834) (under the attorney-client privilege, "the mouth of the attorney shall be for ever sealed"). Indeed, courts in at least thirty-six states and the District of Columbia have recognized that the privilege continues after the client's death. See *Bassett* v. *Newton*, 658 So. 2d 398, 401 (Ala. 1995) (privileged communications "permanently protected from disclosure"); *State* v. *Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976) (criminal case); *Fox* v. *Spears*, 93 S.W. 560, 562 (Ark. 1906); *People* v. *Pena*, 198 Cal. Rptr. 819, 828–829 (Cal. App. 1984) (criminal case); *Peyton* v. *Werhane*, 11 A.2d 800, 803 (Conn. 1940); *State ex rel. State Highway Department* v. *62.96247 Acres of Land*, 193 A.2d 799, 814 (Del. Super. Ct. 1963) (citing Wigmore treatise); *Oliver* v. *Cameron*, 11 D.C. (MacArth. & M.) 237, 239 (1880); *Smith* v. *Smith*, 152 S.E.2d 560, 565 (Ga. 1966); *In re Estate of Marek*, 480 P.2d 609 (Idaho 1971); *Hitt* v. *Stephens*, 675 N.E.2d 275, 278 (Ill. App. 1996), appeal denied, 679 N.E.2d 380 (Ill. 1997); *Mayberry* v. *State*, 670 N.E.2d 1262, 1266–1267 (Ind. 1996) (criminal case); *Bailey* v. *Chicago, Burlington & Quincy Railroad Co.*, 179 N.W.2d 560 (Iowa 1970) (adopting Wigmore position); *In re Curtis' Estate*, 394 P.2d 59, 62 (Kan. 1964); *Carter* v. *West*, 19 S.W. 592, 593 (Ky. 1892); *Morris* v. *Executors of Cain*, 1 So. 797, 807–808 (La. 1887); *Tillinghast* v. *Lamp*, 176 A. 629, 632 (Md. 1935); *Rich* v. *Fuller*, 666 A.2d 71, 74–75 (Me. 1995); *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 70–72 (Mass. 1990) (criminal case); *Lorimer* v. *Lorimer*, 83 N.W. 609, 611 (Mich. 1900); *In re Layman's Will*, 42 N.W. 286, 287 (Minn. 1889) (communications repugnant to "character or reputation" of decedent remain privileged); *McCaffrey* v. *Estate of Brennan*, 533 S.W.2d 264, 266–267 (Mo. App. 1976); *Herrig* v. *Herrig*, 648 P.2d 758, 760, 762 (Mont. 1982); *Lennox* v. *Anderson*, 1 N.W.2d 912, 916 (Neb.), modified on other grounds, 3 N.W.2d 645 (Neb. 1942); *Clark* v. *Second Judicial Dist. Court*, 692 P.2d 512, 514 (Nev. 1985); *Scott* v. *Grinnell*, 161 A.2d 179, 183 (N.H. 1960); *Anderson* v. *Searles*, 107 A. 429, 430 (N.J. 1919) (citing Wigmore); *People* v. *Modzelewski*, 611 N.Y.S.2d 22, 23 (N.Y. App. Div.) (criminal case), appeal denied, 616 N.Y.S.2d 22 (N.Y. 1994); *Hughes* v. *Boone*, 9 S.E. 286, 292 (N.C. 1889) (privilege is "perpetual"); *In re Graf's Estate*, 119 N.W.2d 478, 481 (N.D. 1963); *Swetland* v. *Miles*, 130 N.E. 22, 23 (Ohio 1920); *Cooper* v. *State*, 661 P.2d 905, 907 (Okla. Crim. App. 1983) (criminal case); *State* v. *Doster*, 284 S.E.2d 218, 219 (S.C.) (criminal case), cert. denied, 454 U.S. 1030 (1981); *Miller* v. *Pierce*, 361 S.W.2d 623, 625 (Tex. Civ. App.—Eastland 1962, no writ); *Anderson* v. *Thomas*, 159 P.2d 142, 147 (Utah 1945); *Chahoon* v. *Commonwealth*, 62 Va. (21 Gratt.) 822, 836 (1871) (criminal case) ("[w]ith respect to [privileged] communications, the mouth of the [attorney] is forever sealed"); *Martin* v. *Shaen*, 156 P.2d 681, 684 (Wash. 1945); *In re Smith's Estate*, 57 N.W.2d 727 (Wisc. 1953).

English courts.[5] In addition, each of the 20 state legislatures to have addressed the issue has provided that the absolute attorney-

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[5] See *Bullivant* v. *Attorney-General for Victoria*, 1901 App. Cas. 196, 206 (appeal taken from Q.B.); 13 HALSBURY'S LAWS OF ENGLAND para. 84 at 67 (4th

client privilege does not abate upon the death of the client.[6] Similarly, the Rules of Evidence proposed by this Court in 1972 maintained the privilege after the client's death,[7] as have other model evidence codes.[8] The American Bar Association and a number of commentators likewise have endorsed this common-law rule.[9] And in the analogous situation involving the dissolution or bankruptcy of a corporation, the corporation's attorney-client privilege is routinely recognized to continue.[10]

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ed. 1975); see also *Regina* v. *Derby Magistrates' Court*, [1996] 1 App. Cas. 487, 509 (appeal from Q.B. Div'l Ct.) (Lloyd, L.J., concurring) ("[i]f the client had to be told that his communications were only confidential so long as he had 'a recognisable interest' in preserving the confidentiality, and that some court on some future occasion might decide that he no longer had any such recognisable interest, the basis of the confidence would be destroyed or at least undermined").

[6] See Pet. App. 17a (Tatel, J., dissenting).

[7] See Proposed Fed. R. Evid. 503(c) & adv. comm. note (d)(2), 56 F.R.D. 183, 236, 240 (1972).

[8] See Unif. R. Evid. 502(c) (1986); Model Code of Evid. R. 209(c)(i) & cmt. 6 (1942).

[9] See American Bar Ass'n, FORMAL OPINION 91 (Mar. 8, 1933); American Bar Ass'n, INFORMAL OPINION 1293 (June 17, 1974); 8 John H. Wigmore, EVIDENCE § 2323 at 630–631 (McNaughton rev. ed. 1961); Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45 (1992); Section of Litigation, American Bar Ass'n, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 234 (3d ed. 1996); Paul R. Rice, THE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §§ 2:5–2:6 (1993). Even commentators who criticize the rule recognize that it is firmly established and that a contrary rule is not supported by judicial or legislative authority. See, *e.g.*, PROPOSED RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 & cmts. c & d, Reporter's Note to Comments c & d (Proposed Final Draft No. 1, Mar. 29, 1996) (provision that attorney-client privilege survives the death of the client; although the commentary urges an exception, it acknowledges that "[t]he law recognizes no exception," that cases "routinely hold that the privilege survives," and that "[n]o extant case authority supports the proposed good-cause exception urged in the Comment").

[10] See *CFTC* v. *Weintraub*, 471 U.S. 343, 358 (1985); *Yosemite Inv., Inc.* v. *Floyd Bell, Inc.*, 943 F. Supp. 882, 883 (S.D. Ohio 1996) ("the right to assert the attorney-client privilege is an incident of control of the corporation and remains with corporate management as the corporation undergoes mergers, takeovers, name changes or even dissolutions"); *Bass Public Ltd. Co.* v. *Promus Cos., Inc.*, 868 F. Supp. 615, 619–620 (S.D.N.Y. 1994); *Medcom Holding Co.* v. *Baxter Travenol Laboratories*, 689 F. Supp. 841, 842–843 (N.D. Ill. 1988); *Talley Industries, Inc.* v. *United States*, 188 U.S.P.Q. (BNA) 368, 371–373 (Ct. Cl. 1975) (dissolution of corporation; analogizing to authorities involving death of individual client).

These consistent authorities convincingly establish that the attorney-client privilege continues after the client's death under "the principles of the common law * * * interpreted in the light of reason and experience." Fed. R. Evid. 501; see also *Jaffee*, 116 S. Ct. at 1928, 1930 (provision in Proposed Federal Rules of Evidence for psychotherapist privilege supported adoption of federal privilege as a matter of common law under Fed. R. Evid. 501); *id.* at 1929 & n.11, 1930 (uniform acceptance of psychotherapist privilege by state courts and legislatures supported adoption of federal common-law privilege under Rule 501; "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege").[11] The lesson of history and experience—grounded in human nature and common sense—has been that abrogation of the absolute attorney-client privilege upon the death of the client would discourage the full and forthright disclosure by the client to the attorney that the privilege is designed to promote. Absent a continued privilege, clients would be subject to "the consequences or the apprehension of disclosure" (*Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888)) that—as the basic theory of the privilege recognizes—chills candid and complete communication.

> The subjective freedom of the client, which it is the purpose of the privilege to secure, * * * could not be attained if the client understood that, * * * after the client's death, the attorney could be compelled to disclose the confidences * * *. It has therefore never

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[11] The solitary exception is, as Judge Tatel described it (Pet. App. 29a (Tatel, J., dissenting from denial of rehearing in banc)), "a never-cited opinion of a mid-level Pennsylvania appellate court." See *Cohen* v. *Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976); see also page 15 note 17, *infra*. This aberrational decision—which was not even a criminal case—does not support the panel's ruling in this case and does not even begin to offset the overwhelming weight of contrary authority. See, *e.g.*, *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 71–72.

been questioned * * * that the privilege continues * * * even after the death of the client.

Wigmore § 2323 at 630–631.

B. The Panel Erred In Holding That The Death Of The Client Results In A Qualified Attorney-Client Privilege In Criminal Cases.

1. The panel's reasoning is inconsistent with the fundamental principles underlying the attorney-client privilege.

The decision below rests on a number of conclusions that are irreconcilable with the basic and long-accepted premises of the attorney-client privilege. Although couched in terms of an exception to the privilege upon the death of the client, the panel majority's reasoning is, in reality, at odds with the foundations of the privilege itself.

a. To begin with, the majority asserted that "the privilege obstructs the truth-finding process" and therefore must be "narrowly construed." Pet. App. 6a. However, the consistent judgment of history and experience has been that the privilege is essential to the sound administration of justice and must be applied to accomplish its paramount purposes. See page 6, *supra*; *Jaffee*, 116 S. Ct. at 1928. This principle is fully applicable to grand jury proceedings. See *United States* v. *Calandra*, 414 U.S. 338, 346 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).[12]

Moreover, contrary to the panel's reasoning, this Court has recognized that complete and candid disclosures are unlikely to occur in the first place without the protections of the privilege, and therefore "[a]pplication of the attorney-client privilege to communications such as those involved here * * * puts the adver-

[12] Indeed, the D.C. Circuit itself has recognized the overarching public purposes served by the privilege notwithstanding any incidental effect on fact-finding. See *Rosen* v. *NLRB*, 735 F.2d 564, 572 (D.C. Cir. 1984) (per Starr, J.) ("[t]he attorney-client privilege is but one of several privileges that prevent parties themselves from adducing particular evidence, and thus create an obstacle to fact finding due to the broad judgment that the value of introducing such evidence is outweighed by the harm inflicted upon other policies and values").

sary in no worse position than if the communications had never taken place." *Upjohn*, 449 U.S. at 395; see also *Jaffee*, 116 S. Ct. at 1929 ("[T]he likely evidentiary benefit that would result from denial of the privilege is modest" because "[w]ithout a privilege, much of the desirable evidence to which litigants * * * seek access * * * is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged"); *id.* at 1928; *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 803 n.23 (1984).

b. In addition, the majority suggested that "[i]n the sort of high-adrenalin situation likely to provoke consultation with counsel," the client has adequate incentives to make full disclosure to his lawyer even if the communication is not covered by an absolute attorney-client privilege. Pet. App. 7a. This Court, however, has squarely rejected such reasoning: "the common law has recognized the value of the privilege in further facilitating communications" notwithstanding that "an individual trying to comply with the law or faced with a legal problem * * * has strong incentive to disclose information to his lawyer." *Upjohn*, 449 U.S. at 393 n.2.

c. The majority also reasoned that the privilege should not continue after the client's death because the client was no longer available as an alternative source of the information. Pet. App. 7a. But the possibility of obtaining the desired information from a source other than the attorney has never been the basis for the privilege. See Pet. App. 25a (Tatel, J., dissenting) (discussing numerous situations where attorney-client privilege would apply even though information was not otherwise available).

Furthermore, the possibility of eliciting the information directly from the client during his lifetime is considerably more theoretical than real. While it is conceivable that the client in a criminal investigation would waive the attorney-client privilege (which also could be done by the representative of the client after the client's death), or would relinquish his Fifth Amendment right against self-incrimination through waiver or a grant of immunity from the prosecutor, such circumstances are rare and the prospect of their occurrence remote.

In the end, the attorney-client privilege does not rest on the improbable assumption that the evidence sought from the lawyer will be available from the client. Rather, it embodies the twin principles that such evidence is unlikely to come into existence at all absent the privilege (see page 10, *supra*) and that any marginal unavailability of evidence is a price worth paying for the overriding benefits of the privilege to the legal system (see page 6, *supra*).

d. Finally, the majority concluded that the post-death privilege in criminal cases is governed by "a case-by-case balancing" to determine whether the "relative importance [of the communications sought] is substantial" because they "bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence." Pet. App. 8a, 10a. Once again, this Court has refused to adopt an *ad hoc* balancing test for the attorney-client privilege, holding that such an amorphous standard is antithetical to the certainty necessary for an effective privilege:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Upjohn, 449 U.S. at 393; see also *Jaffee*, 116 S. Ct. at 1932 (rejecting balancing test for psychotherapist privilege because "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege").[13] Unavoidably, the outcome of

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[13] Other courts too have rebuffed similar efforts to use a *post-hoc* balancing test to carve out exceptions to the attorney-client privilege. See, *e.g.*, *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 71 (holding that, in cases involving the death of the client, courts do "not weigh competing interests," and rejecting prosecutor's argument that the "court engage in a * * * weighing and balancing of interests"); *People* v. *Knuckles*, 650 N.E.2d 974, 981–982 (Ill. 1995) (rejecting a "'public interest' exception to the attorney-client privilege," and noting that the justification for the privilege does not diminish with "the passage of time").

a balancing test that turns on such factors as the relative importance of the evidence to the individual case and the availability of the evidence from other sources cannot be predicted *ex ante* at the time of the attorney-client communication and indeed can lead to inconsistent decisions by courts in similar circumstances. See *Upjohn*, 449 U.S. at 393. Accordingly, contrary to the panel's blithe assurance that its case-by-case balancing approach "produces none of the murkiness that persuaded the [Supreme] Court in *Upjohn* and *Jaffee* to reject the limitations proposed here" (Pet. App. 10a), it is clear that the decision below creates exactly such murkiness and is incompatible with the long-recognized need for an absolute rather than a qualified privilege to safeguard attorney-client communications.

2. A qualified posthumous privilege in criminal cases will deter full and candid communications by clients.

Central to the majority's holding was the belief that a "discrete exception" to the absolute attorney-client privilege that created a "posthumous limitation of the privilege" would not deter full and candid disclosures by clients to their attorneys. Pet. App. 8a. In particular, in the majority's view, clients would not be sufficiently concerned about the harm to their reputations from the posthumous revelation of incriminating or embarrassing information that they would be discouraged from imparting such information to their lawyers in the first place. According to the majority, "we would expect the restriction's chilling effect to fall somewhere between modest and nil." *Id.* at 7a. This is a completely unrealistic assessment that is belied by the law of privilege and the lessons of human experience.

First of all, the majority entirely ignored the client's concern over the effects of the posthumous disclosure of incriminating or embarrassing information about himself on his family, friends, and colleagues. Needless to say, such disclosures can be devastating to survivors. So, too, the panel overlooked that a client's communications can—and often do—contain incriminating or embarrassing information about others, including his loved ones and associates. The disclosure of such information to a prosecutor after

the client's death can expose these third parties not only to disgrace but to criminal prosecution. And, in addition to other sanctions, such proceedings can have enormous financial implications for his survivors due to fines, restitution, forfeiture, and even attorneys' fees (cf. *Bennis* v. *Michigan*, 516 U.S. 442 (1996)); although the court below recognized a client's legitimate and substantial concern to provide for his survivors' economic well-being and thus to protect them from civil suit resulting from disclosure (Pet. App. 6a), it entirely ignored the same potentially ruinous effect of their criminal prosecution. Any of these consequences could well discourage a client's candid discussions with his lawyer in the absence of an absolute posthumous privilege. See Pet. App. 24a (Tatel, J., dissenting); American Bar Ass'n, INFORMAL OPINION 1293 (June 17, 1974) (posthumous disclosure of confidential information conveyed by the client "could lead to numerous serious problems involving the client's representatives, surviving relatives and business associates" and "would be in contravention of the very purpose of the privilege"); 2 Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE § 199 at 380 (2d ed. 1994) ("[c]learly a client is concerned not only about himself but about his larger human situation that includes spouses, parents, children, siblings, and extended family, friends, and business associates").[14]

Beyond that, the panel plainly was mistaken in minimizing people's concern about their posthumous reputations and the deterrent effect that can have on frankness and truthfulness. As discussed above, it long has been recognized that the absolute attorney-client privilege survives the client's death and that this continuing privilege is necessary to ensure candid communications between the client and his lawyer during the client's life. The panel's conclusion flies in the face of the accumulated wis-

[14] Contrary to the Independent Counsel's assertion (IC Br. in Opp. 13–14), it is irrelevant that such statements concerning others may not be protected by the client's Fifth Amendment privilege against self-incrimination. The attorney-client privilege is broader than the self-incrimination privilege, and the relevant issue is whether the client's concerns about family and friends would affect his voluntary communications with his attorney absent a continuation of the absolute privilege after his death.

dom embodied in this rule. By itself, this is enough to cast the gravest doubt on the decision below.

What is more, other absolute privileges follow exactly the same rule that the privilege survives the death of the declarant who holds the privilege. Thus, the priest-penitent privilege,[15] the doctor-patient privilege,[16] the psychotherapist-patient privilege,[17] and the spousal privilege for confidential communications[18] all continue unabated after the death of the speaker. This unanimity in privilege law—which the panel did not consider, let alone distinguish—provides telling confirmation of the need for the post-death continuation of an absolute privilege in order to encourage the *inter vivos* communication of highly sensitive information.[19]

[15] See Proposed Fed. R. Evid. 506(c) & adv. comm. note (c), 56 F.R.D. at 247, 249; *Ryan* v. *Ryan*, 642 N.E.2d 1028, 1034 (Mass. 1994).

[16] See *Jewell* v. *Holzer Hosp. Found.*, 899 F.2d 1507, 1513–1514 (6th Cir. 1990); *Leritz* v. *Koehr*, 844 S.W.2d 583, 584 (Mo. App. 1993); *Rittenhouse* v. *Superior Court*, 1 Cal. Rptr. 2d 595, 597 (Cal. App. 1991); *Prink* v. *Rockefeller Ctr., Inc.*, 398 N.E.2d 517, 520 (N.Y. 1979); Wigmore § 2387 at 853 ("The object of the privilege is to secure subjectively the patient's freedom from apprehension of disclosure. It is therefore to be preserved even after the death of the patient").

[17] See Proposed Fed. R. Evid. 504(a), 56 F.R.D. at 241; *Williams* v. *Commonwealth*, 829 S.W.2d 942, 944 (Ky. App. 1992); *Sims* v. *State*, 311 S.E.2d 161, 165–166 (Ga. 1984). The broad potential of the decision below is demonstrated by a recent lower-court opinion holding—in reliance on this case and *Cohen* v. *Jenkintown Cab* (see page 9 note 11, *supra*)—that the Pennsylvania psychotherapist-client privilege was, in the circumstances there presented, no longer absolute after the death of the client. *In re Subpoena No. 22*, Dkt. No. 20 Phil. 1997, 1998 Pa. Super. LEXIS 140 (Pa. Super. Ct. Mar. 2, 1998).

[18] See *Curran* v. *Paskek*, 886 P.2d 272, 276 (Wyo. 1994); *Merrill* v. *William E. Ward Ins.*, 622 N.E.2d 743, 753 (Ohio App. 1993); *Prink*, 398 N.E.2d at 520; *Georgia Int'l Life Ins. Co.* v. *Boney*, 228 S.E.2d 731, 734 (Ga. App. 1976); Wigmore § 2341 at 673.

[19] The law recognizes legally protectable interests in reputation in a number of contexts, such as the law of defamation. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); see also *Spencer* v. *Kemna*, 118 S. Ct. 978, 991 & nn.3–6 (1998) (Stevens, J., dissenting). Importantly, many jurisdictions have expressly included *posthumous* reputation among the areas of protected interests. The value of an artistic creation, for example, fluctuates widely depending on the reputation of its creator, and a number of states allow the successors of artists to recover damages if the artist's work is damaged or altered in a way that harms the artist's reputa-

In addition to the law of privilege, numerous fields of human endeavor attest to the importance the living attach to their reputations after death. From time immemorial, literature, philosophy, religion, and other disciplines have recognized this human characteristic. For example, the Bible states:

> All these were honored in their generations, and were the glory of their times.
>
> There be of them, that have left a name behind them, that their praises might be reported.
>
> And some there be, which have no memorial; who had perished, as though they had never been; and are become as though they had never been born; and their children after them.[20]

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tion. See, *e.g.*, Cal. Civ. Code § 987(g)(1); Conn. Gen. Stat. § 42-116t(d)(1); Mass. Gen. L. ch. 231 § 85S(g); 73 Pa. Stat. Ann. § 2107(1). Similarly, several states have recognized the value of posthumous reputation by making it a misdemeanor to "blacken the memory of the dead." Robert E. Keeton, *et al.*, PROSSER & KEETON ON TORTS § 111 at 778–779 (5th ed. 1984); see also, *e.g.*, Colo. Rev. Stat. § 18-13-105; Ga. Code Ann. § 16-11-40; Idaho Code § 18-4801; Nev. Rev. Stat. § 200.510; N.D. Cent. Code § 12.1-15-01; 21 Okla. Stat. § 771; Utah Code Ann. § 76-9-501; Wash. Rev. Code § 9.58.010. Some states likewise have enacted statutes allowing new defamation actions to be brought, or pending actions to survive, even after the death of the defamed individual. See, *e.g.*, R.I. Gen. Laws § 10-7.1-1; 12 Okla. Stat. § 1441; Tex. Civ. Prac. & Rem. Code Ann. § 73.001; Utah Code Ann. § 45-2-2. See generally Francis M. Dougherty, Annotation, *Defamation Action as Surviving Plaintiff's Death, Under Statute Not Specifically Covering Action*, 42 A.L.R.4th 272 (1985) (collecting authorities). These bodies of law directly undermine the facile assumption of the court below that posthumous reputation is too slight an interest to merit judicial concern. See also *MacDonald* v. *Time, Inc.*, 554 F. Supp. 1053, 1054 (D.N.J. 1983) ("[t]o say that a man's defamed reputation dies with him is to ignore the realities of life and the bleak legacy he leaves behind").

[20] THE BIBLE: Apocrypha, at 44:7–9, quoted in John Bartlett, FAMILIAR QUOTATIONS 32:14 (16th ed. 1992). See also *id.*, Ecclesiastes 7:1, quoted in Bartlett at 24:6 ("[a] good name is better than precious ointment"); Leonidas of Tarentum, in THE GREEK ANTHOLOGY, no. 189 (Jay ed. 1973), quoted in Bartlett at 83:1 ("Far from Italy, far from my native Tarentum I lie; and this is the worst of it—worse than death. An exile's life is no life. But the Muses loved me. For my suffering they gave me a honeyed gift: My name survives me. Thanks to the sweet muses, Leonidas will echo throughout all time"); Juvenal, SATIRES, VIII, *l.* 83,

Writers such as Longfellow likewise have recognized the value people place on their reputations after death:

> Lives of great men all remind us
> We can make our lives sublime.
> And, departing, leave behind us
> Footprints on the sands of time.[21]

Thus, in the words of Shakespeare: "Mine honor is my life; both grow in one; Take honor from me, and my life is done."[22]

This natural human concern manifests itself in numerous ways. For example, Judge Tatel noted the many acts of philanthropy that indicate "that human beings care deeply about how posterity will view them." Pet. App. 22a–23a (Tatel, J., dissenting). A particularly vivid example is that of Alfred Nobel, the inventor of dynamite and founder of the Nobel Prize. Upon the premature report of his death, Nobel was criticized as a "'merchant of death' who had built a fortune by discovering new ways to 'mutilate and kill.'" This

> pained him so much he never forgot it. Indeed, he became so obsessed with his posthumous reputation that he rewrote his last will, bequeathing most of his

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quoted in Bartlett at 109:6 ("Count it the greatest sin to prefer life to honor, and for the sake of living to lose what makes life worth having"); Publilius Syrus, MAXIMS 108, 265, quoted in Bartlett at 99:2, 9 ("A good reputation is more valuable than money"; "What is left when honor is lost?").

[21] H. Longfellow, A PSALM OF LIFE st. 7, quoted in Bartlett at 440:17.

[22] W. Shakespeare, KING RICHARD THE SECOND, act I, sc. i., *l.* 182, quoted in Bartlett at 170:26. See also *id.*, *l.* 177, quoted in Bartlett at 170:25. ("[t]he purest treasure mortal times afford [i]s spotless reputation"); W. Shakespeare, OTHELLO, II, iii, 264, quoted in Bartlett at 206:20 ("Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial"); *id.*, III, iii, 155, quoted in Bartlett at 206:30, and in *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 12 (1990) ("Good name in man and woman, dear my lord, [i]s the immediate jewel of their souls; Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name [r]obs me of that which not enriches him, [a]nd makes me poor indeed"); M. de Cervantes, DON QUIXOTE DE LA MANCHA, pt. I, bk. IV, ch. 1, p. 226, quoted in Bartlett at 150:4 ("My honor is dearer to me than my life").

> fortune to a cause upon which no future obituary writer would be able to cast aspersions.

Kenne Fant, ALFRED NOBEL 207 (Ruuth transl. 1993). See also Nicholas Halasz, NOBEL 3–4 (1959).

Similarly, concerns about posterity and the post-death revelation of private information are evidenced in people's treatment of historical materials. Readers of autobiographies and memoirs are familiar with the common focus of authors on their enduring reputations and the judgment of history. What is more, such concerns have led numerous public officials to destroy their papers in anticipation of their deaths.[23] For example, Justice Black, in what was termed "Operation Frustrate the Historians," directed on the eve of his death that his Court papers be destroyed.[24] A number of other justices also have destroyed their papers,[25] as have several presidents.[26] And many prominent private citizens as well have

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[23] This has been true since the time of our nation's founding. For example, Charles Thomson, the Secretary to the Continental Congress throughout the Revolutionary War, destroyed his papers during his last years:

> Later during his retirement Thomson even destroyed most of his papers. He commented that he did so because, if the truth were known, many careers would be tarnished and the leadership of the nation would be weakened. Just what disgraceful deeds Thomson referred to will never be known, since the records his papers contained are lost forever.

J. Edwin Hendricks, CHARLES THOMSON AND THE MAKING OF A NEW NATION, 1729–1824, at 189 (1979).

[24] See Roger K. Newman, HUGO BLACK 621–622 (1994); see also Alexandra K. Wigdor, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES 48 (1986) (Justice Black ordered the destruction of his conference notes because of the "'fear that publishing them might inhibit the free exchange of ideas'" and because "'reports by one Justice of another's conduct in the heat of a difference might unfairly and inaccurately reflect history'"); *id.* at 34.

[25] See Wigdor at 4 ("until recently, judges have tended to destroy their working papers"). Chief Justice White and Justices Cardozo, McKenna, Minton, Peckham, Pitney, and Roberts destroyed their papers, and the papers of Justices Lurton and Wayne were destroyed by their survivors. *Id.* at 25 n.50, 35, 73, 140, 141, 154, 168, 169, 175, 219, 221.

[26] See Carl McGowan, *Presidents and Their Papers*, 68 MINN. L. REV. 409, 412–413 (1983); *Nixon* v. *United States*, 978 F.2d 1269, 1279–1280, 1287–1297

done the same thing.[27] Although human motivations are complex and sometimes difficult to ascertain, this experience is sufficient to belie the facile assumption of the majority below that the post-death disclosure of incriminating or embarrassing information would have little or no effect in discouraging candid attorney-client discussions.

As the foregoing demonstrates, it is a normal human trait to be concerned about one's reputation after death, and *amici* submit that people in general would be deterred from candid attorney-client communications by the knowledge that, under the panel's decision, the familiar privilege does not in fact protect against highly sensitive post-death disclosures. This deterrent effect would be especially great where, as apparently was the case here, the cli-

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(D.C. Cir. 1992). See also Introduction and Provenance to Index to Harding Papers, Library of Congress, Manuscript Division, at 3 (n.d.) (shortly after President Harding's death, his wife destroyed "any material which might have proven harmful to the memory of her husband"); Paul C. Nagel, THE LEES OF VIRGINIA: WOMEN 228 (1987) (President John Adams' granddaughter, who "devoted much of her life * * * to preserving letters and memorabilia of her famous grandparents and other relatives[,] * * * carefully pruned the manuscripts * * * in the hope that by burning letters she might brighten history's memory").

[27] See Frankel, 6 GEO. J. LEGAL ETHICS at 62 n.86 (" '[c]ontemplating their ultimate exits, Henry James, Walt Whitman, Charles Dickens and many others put their correspondence and private papers in the fire out of fear that some biographer might get hold of them'"); Karl E. Meyer, *Need a Sure Way to Settle an Argument Or Hide a Scandal? Burn the Letters*, N.Y. TIMES, Feb. 9, 1998, at A17.

Likewise, survivors often work to maintain or restore the reputation of their decedents. For example, Dr. Sam Sheppard was acquitted on retrial of murder charges after this Court reversed his initial conviction in a highly sensationalized trial (see *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966)), but the general public remained convinced of his guilt. He died a broken man in 1970, and his son has made extensive efforts to clear his father's name. See John Blades, *Presumed Guilty: Sam Sheppard's Son Struggles to Clear the Infamous—and Acquitted—Doctor's Name*, CHI. TRIB., Oct. 25, 1995, Tempo Section at 1. Similarly, even more than 100 years after his death, descendants are still seeking to establish the innocence of Dr. Samuel Mudd. Dr. Mudd treated John Wilkes Booth the day after President Lincoln was assassinated; he was convicted of complicity in the assassination and sentenced to life imprisonment, but was pardoned by President Andrew Johnson. See John E. McHale, Jr., *Dr. Mudd Deserves to Have His Name Cleared*, WASH. TIMES, Oct. 4, 1997, at B3.

ent consults the lawyer in contemplation of death. See Pet. App. 23a, 24a–25a (Tatel, J., dissenting); cf. *Jaffee*, 116 S. Ct. at 1929 & n.10. When death is expected or imminent—whether from advanced age, illness, suicide, or other cause—the client understandably is most likely to have in mind the way he will be remembered by his family, friends, business associates, and community in general. It is fanciful to say, as the panel did, that he would be unconcerned about his post-death reputation and undeterred by the prospect of disclosure of attorney-client communications. See Pet. App. 5a ("'[f]ew clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense'"). While the privilege is not limited to this situation, these circumstances make plain the error in the court of appeals' reasoning.[28]

Similarly, concern about post-death reputation is likely to be particularly significant where the client's professional life was founded on his good name. Here, for example, the client was himself a lawyer and, as such, his "professional reputation * * * [was his] most important and valuable asset." *Walker* v. *City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997); see also *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part) ("most lawyers are wise enough to know that their most precious asset is their professional reputation"). In fact, it is painfully clear that the client in this case placed the highest value on his reputation at the bar and in his community.[29] It thus

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[28] In fact, as the district court emphasized (Pet. App. 41a), "one of the first notations on the document is the word: 'Privileged.'" See also *id.* at 25a (Tatel, J., dissenting) (representation by counsel that "'I am totally certain * * * [that i]f I had not assured Mr. Foster that our conversation was a privileged conversation, we would not have had the conversation and there would be no notes that are the subject of the situation today'").

[29] In a commencement address to his law school *alma mater* shortly before his death, he observed the following:

> The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy. * * * I cannot make this point to you too strongly. There is no victory, no advantage, no fee, no favor which is worth even a blemish on your reputation for intellect and integrity. * * * Dents to the reputation in the legal profession are irreparable.

Vincent W. Foster, Jr., "Roads We Should Travel," Commencement Address at the Law School of the University of Arkansas (May 8, 1993), reprinted in Robert B. Fiske, Jr., REPORT OF THE INDEPENDENT COUNSEL: IN RE VINCENT W. FOSTER, JR. (June 30, 1994), app. 7. Likewise, in a note written around the time of his death, he expressed his deep concern that "in Washington * * * ruining people is considered sport." *Id.*, app. 5. Based on this and other evidence, the Fiske Report concluded that "[h]is professional reputation was of paramount importance to him." *Id.* at 8. See also Kenneth W. Starr, REPORT OF THE OFFICE OF INDEPENDENT COUNSEL ON THE DEATH OF VINCENT W. FOSTER, JR. 98 (1997) (his "'public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance'").

blinks reality to sweep aside, as the majority below did, the concern of clients for their reputations after death.

3. The absolute posthumous privilege is not undermined by the corollary rule that the privilege is inapplicable in cases involving claims by the deceased client's heirs.

In support of a qualified posthumous privilege, both the panel (Pet. App. 3a & n.1) and the Independent Counsel (IC Br. in Opp. 8–9, 15) place great weight on the so-called "testamentary" rule that the attorney-client privilege does not bar disclosure of the deceased client's confidential communications in cases involving claims by the client's heirs. They reason that this "exception" to the absolute posthumous privilege negates the privilege itself. This argument ignores the longstanding recognition of both the absolute privilege and the testamentary rule and misapprehends the rationale for the testamentary rule.

The law long has recognized both the absolute posthumous privilege and the testamentary rule. This Court, in applying the testamentary rule in certain situations (as discussed *infra*), accepted the continued existence of the absolute posthumous privilege in all other circumstances. See *Glover* v. *Patten*, 165 U.S. at 406–407; *Blackburn* v. *Crawfords*, 70 U.S. (3 Wall.) at 193. By itself, this historical co-existence refutes the assertion that the testamentary rule negates the basic privilege. On this question, in

Justice Holmes' apt phrase, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

Moreover, contrary to the assumption of the panel and the Independent Counsel, the testamentary rule is not an exception to or inconsistent with the absolute posthumous privilege. Rather, once the theory of the testamentary rule is correctly understood, it becomes clear that the rule is a corollary of and completely compatible with the absolute privilege.

As the panel noted (Pet. App. 3a n.1), the testamentary rule "applies only when the parties are claiming 'through the client,' not when a party claims against the estate." The rule rests on two rationales.

The first rationale reflects the fact that the identity of the holder of the privilege after the client's death may not be known at the time the privilege issue arises. This occurs, for example, in cases in which competing claimants each contend that he is the rightful heir of the deceased client. In that situation, it cannot be determined, prior to the conclusion of the litigation, who is the proper successor to the client and therefore who is the holder of the privilege entitled to invoke or waive it. As explained in the Advisory Committee Note to Proposed Federal Rule of Evidence 503:

> Normally the privilege survives the death of the client and may be asserted by his representative. * * * When, however, the identity of the person who steps into the client's shoes is in issue, as in a will contest, the identity of the person entitled to claim the privilege remains undetermined until the conclusion of the litigation. The choice is thus between allowing both sides or neither to assert the privilege, with authority and reason favoring the latter view.

Proposed Fed. R. Evid. 503, adv. comm. note (d)(2), 56 F.R.D. at 240. See also, *e.g.*, 3 WEINSTEIN'S FEDERAL EVIDENCE § 503.32 (McLaughlin ed., 2d ed. 1997); 2 Mueller & Kirkpatrick § 197 at 377–378. That rationale was adopted by this Court more than a century ago. *Glover* v. *Patten*, 165 U.S. at 406–407.

The second rationale is implied waiver where disclosure would serve to effectuate the deceased client's testamentary intent. In that situation, "if the decedent could be asked, he would want to waive the privilege so that the lawyer could dispose of the property according to his wishes." Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING § 1.6:101 at 131 n.5.7 (Supp. 1998). See also, *e.g.*, 2 Mueller & Kirkpatrick § 197 at 377. That rationale, too, has been endorsed by this Court. *Blackburn* v. *Crawfords*, 70 U.S. (3 Wall.) at 193–194.

Both of these theories for the testamentary rule in the limited circumstances in which it applies are entirely consistent with the general recognition of an absolute posthumous privilege in all other situations. As the panel acknowledged (Pet. App. 3a n.1), the law distinguishes between claims under the deceased client, to which the testamentary rule is applicable, and claims by third parties against the interest of the deceased client, to which the absolute privilege remains in full force. See *Glover* v. *Patten*, 165 U.S. at 406–407; *Blackburn* v. *Crawfords*, 70 U.S. (3 Wall.) at 193. The present case falls clearly within the latter category, and indeed there is not even a contention that the testamentary rule is applicable here (see Pet. App. 3a n.1). Accordingly, this case is controlled by the absolute posthumous privilege, and the existence of that privilege is not defeated by the testamentary rule.[10]

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[10] The majority below and the Independent Counsel also argue that most litigated cases involve the testamentary rule rather than the basic privilege. Even if true, that argument casts no doubt on the absolute privilege. First of all, given the important financial interests at stake, it is hardly surprising that much of the litigation that follows the death of clients would concern estate matters. Moreover, very few prosecutors have ever sought posthumous disclosure of attorney-client communications by arguing, contrary to settled understandings, that the well-established absolute privilege is transformed into only a qualified privilege upon the death of the client.

II. THE STRINGENT PROTECTION FOR MENTAL-IMPRESSION WORK PRODUCT APPLIES TO THE LAWYER'S NOTES OF HIS PRELIMINARY MEETING WITH THE CLIENT.

The majority below also held that the lawyer's notes of his meeting with his client were not protected by the attorney work-product privilege. The panel reasoned that factual materials contained in the lawyer's notes did not reflect the lawyer's mental impressions, thought processes, or strategies because "the interview was a preliminary one initiated by the client" and thus "the lawyer ha[d] not sharply focused or weeded the materials." Pet. App. 13a, 14a. Accordingly, it held that disclosure of factual materials in the subpoenaed notes was governed by the relatively lax work-product standard for purely factual materials—which "merely shifts the standard presumption in favor of discovery, so that [such materials] are discoverable where the person seeking discovery * * * [makes] a showing of 'substantial need' and 'the inability to obtain the substantial equivalent of the information . . . from other sources without "undue hardship"'" (*id.* at 11a–12a)—rather than by the stringent standard for mental-impression work product.

The majority's decision was patently erroneous and reflects a wholly unrealistic view of the responsibility and functioning of the legal profession. Moreover, it is rebutted by decisions of other courts that have recognized that the disclosure of factual materials can reveal an attorney's mental processes and therefore is subject to the most stringent work-product standard. A lawyer's notes of a meeting with a client that otherwise fall within the safeguards for mental-impression work product, as here, do not lose that protection simply because the meeting was a preliminary one requested by the client.

Unlike the attorney-client issue discussed above, the work-product question is not limited to situations in which the client has died. Nor is it limited to criminal cases but applies to civil litigation as well. Furthermore, preliminary client meetings occur across the country on a daily basis for lawyers of all kinds—private practitioners, in-house counsel, and even government attorneys. Unless reversed, the court of appeals' decision will have an immediate and detrimental effect on this day-to-day practice of law; just as the panel's attorney-client decision will deter clients from candid communications with their lawyers, so, too, its work-product decision will deter lawyers from "taking notes at early, critical meetings with clients," which "[n]ot only will * * * damage the ability of lawyers to represent their clients but in the end [will mean that] there will be no notes [to discover]." Pet. App. 31a (Tatel, J., dissenting from denial of rehearing in banc).[11]

A. A Strict Work-Product Privilege For An Attorney's Mental Impressions Is Essential To Our System Of Justice And Applies To The Disclosure Of Factual Information In An Attorney's Notes That Would Reveal His Thoughts And Judgments.

The work-product privilege recognizes that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman* v. *Taylor*, 329 U.S. 495, 510–511 (1947). Without such a doctrine, "[t]he effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.* at 511. In particular, absent work-product protection, "much of what is now put down in writing would remain unwritten." *Ibid.* The work-product "doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system." *United States* v. *Nobles*, 422 U.S. 225, 238 (1975). The doctrine reflects "strong 'public policy'" (*id.* at 236), and "its role in assuring the proper functioning of the criminal justice system is * * * vital." *Id.* at 238.

As this Court summarized in *Upjohn*, the work-product doctrine imposes a stringent standard of protection for the mental

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[11] The panel's ruling also will breed a disruptive and wasteful generation of work-product litigation as lawyers and courts struggle to determine what is meant by such elastic and undefined terms as a "preliminary" meeting or a "focus[ing] or weed[ing]" of the facts.

processes of attorneys. Some courts have adopted an absolute rule that "no showing" can overcome the privilege for such materials; other courts, while "declining to adopt an absolute rule," nonetheless have held that "such material is entitled to special protection" and is discoverable "'only in a rare situation.'" 449 U.S. at 401.[32] By contrast, as the panel below observed, factual information is subject to a less stringent balancing standard that takes account of the need for the information and its availability from other sources.

Notwithstanding this general division between mental impressions and facts, it is clear that the disclosure of factual materials in a lawyer's notes can reveal his mental impressions. For example, the factual information that a lawyer elicits from the client as helpful (or harmful) readily provides an open window into the lawyer's strategy and his judgments about the strengths and weaknesses of the case. See *Hickman*, 329 U.S. at 511 ("[p]roper preparation of a client's case demands that [the lawyer] assemble information"); *Upjohn*, 449 U.S. at 391 ("'a lawyer should be fully informed of all the facts of the matter he is handling'") (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY). In addition, the information the lawyer distills and chooses to memorialize from all that the client says also exposes his thought processes. See *Upjohn*, 449 U.S. at 399–400 (attorney's notes reflect "'what he saw fit to write down regarding witnesses' remarks'" and "'would be his [the attorney's] language, permeated with his inferences'"); *id.* at 391 ("'[i]t is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant'") (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY); *Hickman*, 329 U.S. at 511 (attorney must "sift what he considers to be the relevant from the irrelevant facts"); see also *Kalina* v. *Fletcher*, 118 S. Ct. 502, 510 (1997) ("the selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate").

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[32] In *Upjohn*, the Court found it unnecessary to resolve which of these two strict standards applies to mental-impression work product. 449 U.S. at 401–402.

In light of these practical realities, this Court has held that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Upjohn*, 449 U.S. at 399. Consistent with *Upjohn*, a number of courts of appeals have recognized that the compelled disclosure of factual information in an attorney's notes that will divulge his mental processes is subject to the stringent work-product standard of absolute or near-absolute protection. See, *e.g.*, *In re Allen*, 106 F.3d 582, 607–608 (4th Cir. 1997), cert. denied, 118 S. Ct. 689 (1998); *Cox* v. *Administrator, U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995); *In re Grand Jury Proceedings*, 473 F.2d 840, 841–842, 848 (8th Cir. 1973).[33] By instead applying the much less strict standard of need and alternative availability that relates to purely factual materials, the court below erred.[34]

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[33] Similarly, in applying the work-product and deliberative-process doctrines under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), courts have held that otherwise disclosable facts that reveal protected thought processes or deliberations are exempt from disclosure. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *EPA* v. *Mink*, 410 U.S. 73, 91 (1973); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Petroleum Info. Corp.* v. *Department of Interior*, 976 F.2d 1429, 1434–1436 (D.C. Cir. 1992); *Nadler* v. *Department of Justice*, 955 F.2d 1479, 1491–1492 (11th Cir. 1992); *Bristol-Myers Co.* v. *FTC*, 598 F.2d 18, 29–30 n.23 (D.C. Cir. 1978); *Kent Corp.* v. *NLRB*, 530 F.2d 612, 624 (5th Cir.), cert. denied, 429 U.S. 920 (1976).

[34] The cases cited by the Independent Counsel (IC Br. in Opp. 18)—which did not involve "preliminary" client interviews or asserted failures by counsel to "focus[ ]" or "weed[ ]" the facts—are not to the contrary. See *In re Grand Jury Investigation*, 599 F.2d 1224, 1228, 1231–1232 (3d Cir. 1979) (a lawyer's interview memoranda that "indirectly reveal the attorney's mental processes, his opinion work product" is "discoverable only in a 'rare situation'"; disclosure of memorandum of interview with deceased witness was ordered where "opinion work product * * * [would be] delete[d] * * * from the factual recitation" so that the lawyer's "'mental impressions, conclusions, opinions, or legal theories' [would be redacted]"); *In re John Doe Corp.*, 675 F.2d 482, 492–493 (2d Cir. 1982) ("the mental processes and legal theories of the interviewing attorney * * * are entitled to the greatest possible protection under the work-product immunity"; lawyer's notes of interview with still-living witness ordered disclosed where "the work-product itself * * * [was] part of a criminal scheme," and where disclosure "will

B. Because The Attorney Exercises His Professional Judgment In The Information He Elicits And Records, A Lesser Work-Product Privilege Does Not Apply To His Initial Meeting With A Client.

Contrary to the decision below, a lesser work-product standard does not apply here simply because this was a "preliminary [meeting] initiated by the client." Pet. App. 13a. Indeed, after *in camera* review (*id.* at 39a), the district court determined that the notes "'reflect the mental impressions'" of the attorney. *Id.* at 12a.

Even in a "preliminary" meeting, and no less in one "initiated by the client," the lawyer brings to bear his professional judgment and experience in representing his client in anticipation of litigation. See Pet. App. 30a–31a (Tatel, J., dissenting from denial of rehearing in banc). Although the discussion may be, as the panel suggested, "a fairly wide-ranging discourse from the client" (*id.* at 13a), that is not in any way inconsistent with the lawyer's professional efforts to elicit the information—pro and con—that he considers significant in formulating his strategy and planning future steps. See 1 Fred Lane, LANE GOLDSTEIN TRIAL TECHNIQUE § 1.03 at 3 (3d ed. 1997) & 1 (Supp. 1997) (the "initial client interview" is "[o]ne of the most important stages in legal representation" and "crucial to the preparation for trial"; "[t]he attorney's theory of the case is often shaped by information gathered from the client during the initial client interview"). Nor is the need for a "wide-ranging" discussion inconsistent with the lawyer's exercise of professional judgment as reflected in his decisions to include some but not other information in his notes, his choice of language to record the information, and his interlineated or marginal comments and questions that accompany the information. In this case, for instance, the lawyer—a highly experienced attorney in criminal cases—took only three pages of notes during a two-hour interview, thereby exercising considerable professional judgment as to what to write down, and he underlined and placed check marks and question marks by certain passages that he believed important for any number of possible reasons or future uses. See

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not trench upon any substantial interest protected by the work-product immunity" or "reveal anything worthy of the description 'legal theory' ").

id. at 31a (Tatel, J., dissenting from denial of rehearing in banc). Moreover, the record establishes (*id.* at 40a), as would be expected, that the attorney in fact prepared for the initial meeting with the client by reviewing materials and making notes, and thus he brought not only his experience but also his own information, questions, and legal opinions—however tentative or fragmentary—to the meeting.

In short, to say, as the panel did, that lawyers do not "sharply focus[ ] or weed[ ]" the facts at a "preliminary" client meeting in order to facilitate a "wide-ranging" discussion (Pet. App. 14a, 13a) is simply out of touch with the experience of practicing members of the bar. Even at an initial conference, the lawyer is exercising his professional judgment in both the information he elicits and the information he takes down. This process of obtaining and recording information is at the heart of the work-product privilege and is entitled to the most stringent protections.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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April 1998

No. 97-1192

In The

Supreme Court of the United States

October Term, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITIONERS

The American College of Trial Lawyers files this brief as *amicus curiae* pursuant to the written consent of the parties.[1]

INTEREST OF AMICUS CURIAE

The American College of Trial Lawyers (the "College"), an organization of lawyers in this country and Canada skilled and experienced in the trial of cases, seeks to improve and enhance the standards of trial practice, the administration of justice and the ethics of the profession. Membership in the College is by invitation. The College strives to induct as Fellows lawyers from the top rank of the trial bar of each jurisdiction. The College limits membership to one percent of the number of persons admitted to practice in any particular state. To qualify as a Fellow, a lawyer must have at least fifteen years of trial experience.

Concern for the preservation of the attorney-client privilege motivates the College to submit this brief. The College considers the privilege a critical feature of our adversary system of justice. The College's Board of

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or its counsel.

Regents has authorized the College to seek *amicus curiae* participation in support of petitioners – as it authorized the College to seek *amicus curiae* participation in support of the petition for certiorari – because the issues presented fundamentally affect the relationship between lawyer and client, the administration of justice and the conduct of the legal profession.

The briefs filed by the parties set forth the particular facts of this case and their respective interests in the litigation. The impact of the decision below, however, extends far beyond the parties to this litigation. It will create a substantial gap in the attorney-client privilege by providing that, in certain criminal cases, the privilege does not survive the death of the client. This decision, which runs counter to more than a century of precedent, will have drastic and unfortunate implications for the legal profession and the administration of justice. Accordingly, the College files this brief *amicus curiae* to present the considerations of broader policy with which it is particularly concerned, as well as its view regarding the sweeping, negative impact that is likely to result from the Court of Appeals decision.

SUMMARY OF ARGUMENT

The College urges reversal because the decision of the Court of Appeals contains dangerous implications for attorney-client relations far beyond its narrow factual context. In particular, the Court of Appeals creates a

general theoretical framework for determining the applicability of the attorney-client privilege that threatens continuing future erosion of the privilege. In identifying its goal as "maximiz[ing] the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes," Pet. App. 6a, the court suggests that every challenge to the privilege provides a new occasion for ad-hoc judicial balancing. Underscoring the risks of this approach, the court proceeds to create an exception without the benefit of factual or legal support, making plain that proponents of the privilege bear the burden of demonstrating its utility in every instance. Given the open-ended nature of the court's inquiry, the breadth of its rationale, and the difficulties in proving the benefits of confidential communications, the court's approach potentially supports many additional exceptions to the privilege. Thus, the decision will create a general uncertainty in the minds of lawyers and their clients regarding the scope of the privilege that necessarily will chill the full and frank communications essential to the attorney-client relationship.

The rationales offered by the Court of Appeals for the particular exception it creates are equally broad and no less troubling. The court myopically assumes that clients do not care about posthumous disclosure of their communications in criminal proceedings because the clients will, by definition, not be directly affected by such disclosures. Yet experience teaches the opposite – that clients care deeply about many posthumous developments such as events affecting their reputations and their estates, as well as the ongoing welfare of their friends or

family. Obviously, it is important to preserve clients' ability to confide in lawyers with respect to these subjects. But the logic of the Court of Appeals opinion would support disclosure in these and many other contexts, as it might just as easily be assumed that a client no longer cares about his business or his estate after death. In this respect as well, the decision lays the foundation for future erosion on the privilege.

Clients can draw little solace from the Court of Appeals' efforts to narrow the scope of its exception by limiting it to criminal proceedings and by introducing a balancing test. The distinction between civil and criminal cases breaks down in such instances as civil forfeiture, in which a criminal proceeding against a client's relative may result in forfeiture of the client's property, or in cases involving parallel criminal and civil or administrative proceedings. Limiting disclosure to criminal proceedings based on a post-hoc determination of the "importance" of the communications at issue also does nothing to allay the fear of a client, at the time of a particular communication, that a court will someday order its disclosure. In sum, reversal is appropriate both because the particular exception created by the Court of Appeals is unsound, and because, in creating this exception, the Court of Appeals has written a road map for further and equally unwarranted and unpredictable exceptions to the privilege.

ARGUMENT

I. The Court Of Appeals Decision Lays The Foundation For An Unwarranted Further Erosion Of The Attorney-Client Privilege.

A. The Court Of Appeals Decision Inappropriately Creates A Presumption Against The Attorney-Client Privilege.

The Court of Appeals decision authorizing disclosure of attorney-client communications deemed "important" in certain criminal proceedings following the death of the client, creates an exception to the long-standing common law rule without any factual or legal support. In announcing a standard far easier to state than to apply, the court declares that its "object . . . is to maximize the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes." Pet. App. 6a. As a threshold matter, the notion that any effort to create an exception to the privilege warrants a fresh policy assessment of the pros and cons of disclosure stands in stark contrast to hundreds of years of authority according absolute protection for attorney-client communications apart from a few, well-defined exceptions such as the crime-fraud and testamentary exceptions.

But even assuming that "maximizing the sum of the benefits of confidential communications and those of finding the truth" represents the proper approach, the court's application of that standard leaves much to be desired. Far from undertaking this inquiry with the precision suggested by the court's formulation, the court proceeds without any empirical evidence to support its

central conclusion that clients are unlikely to be inhibited by posthumous disclosure of their communications to attorneys in subsequent criminal proceedings. Nor does the court identify any cases or statutes supporting its interpretation of the privilege, stressing instead the purported absence of an articulated rationale in the long line of authority supporting survival of the privilege after death as a basis for ignoring this body of precedent.

Essentially, the Court of Appeals creates a presumption against the privilege, burdening its proponents with the task of demonstrating its validity. This approach might be warranted if a new privilege was being created, but given the long and virtually unbroken history of precedent supporting survival of the attorney-client privilege after death, the onus should be on those proposing a departure from the long-standing common law rule to justify the change.

B. The Court Of Appeals' Assumption That Its Decision Will Not Chill Attorney-Client Communications Is Both Unsupported And Unsound.

The court's central assumption – that clients will be indifferent to posthumous disclosure of their communications in criminal proceedings because such disclosure cannot affect them directly – is troubling in several respects. First, it is counterintuitive. Experience teaches that clients care deeply about many posthumous subjects that do not affect them tangibly, such as their reputations after death and legal consequences that might befall friends and family. Clients often seek advice and counsel

from lawyers about these subjects, and value highly the confidential nature of these conversations. The Court of Appeals acknowledges this concern in suggesting that posthumous disclosure of client communications in civil proceedings may not be appropriate, because clients have a "motive to preserve their estates" and thus would be troubled by disclosure of privileged communications that might affect their estates. Pet. App. 6a.

This concern applies with at least equal force in the criminal context. A client troubled about the effect of posthumous disclosure on the size of a bequest for a relative will be equally if not more troubled about the possibility that such disclosure could land the relative in prison. Suppose a client confides in his lawyer, for example, with regard to an estate planning decision influenced in part by his son's drug problem that, after the client's death, becomes the subject of a criminal prosecution. Under the Court of Appeals decision, this client cannot confide in his lawyer without disclosure of information that will be usable against his son.

Likewise, disclosure of a protected communication in a subsequent criminal action may put the client's family member in physical danger. For example, a client may seek legal advice about resistance to extortion or blackmail attempts, only to have his lawyer's subsequent testimony in a criminal proceeding result in retaliation against the client's family. Clients faced with that risk will be discouraged if not prevented from obtaining needed legal advice. The existence of myriad other examples is obvious.

C. The Rationale Of The Court Of Appeals Decision Would Support Other Unwarranted Exceptions To The Privilege.

1. The Notion That Clients Do Not Care About Disclosure Of Communications That Do Not Affect Them Personally Is Not Limited To Posthumous Criminal Proceedings.

The logic of the Court of Appeals' assumption that clients are indifferent to posthumous disclosure extends well beyond the context of this case. As noted, this assumption rests on the faulty premise that clients only care about events that affect them personally. There is no logical limitation of this premise to criminal liability. It is just as natural to suppose that clients will have no concern about the fate of their businesses or the size of their estates after death because at that point they will be no more personally affected by developments in these areas than in a subsequent criminal proceeding. Thus, notwithstanding the court's disclaimers, its rationale would logically support expansion of its exception to posthumous disclosure in all civil proceedings. Worse yet, it is but a short leap to the assumption that clients have no concern about any disclosures they make, even during their lifetime, regarding other individuals or entities, thus paving the way for elimination of the privilege in a wide variety of additional contexts.

There are also practical circumstances in which the Court of Appeals' distinction between civil and criminal cases will prove unworkable. For example, a criminal proceeding against a client's child may result in a civil forfeiture action against the client's property. *See, e.g., United States v. One Parcel of Property at 31-33 York Street,*

930 F.2d 139 (2d Cir. 1991) (affirming forfeiture of house belonging to mother following arrest of her sons for drug sales allegedly conducted from the house). In such a case, introduction of a communication as evidence in a criminal proceeding may unavoidably affect a civil proceeding as well, thereby preventing the client from claiming the benefit of the privilege in that proceeding.

Nor is the overlap between criminal and civil proceedings limited to the forfeiture area. Parallel criminal and civil or administrative proceedings occur with increasing frequency in the areas of antitrust, tax, government contracts, and securities law. Under the Court of Appeals decision, disclosure of a privileged communication in, for example, a criminal antitrust action might lead to liability in a subsequent civil class action based on the same conduct. Similarly, disclosure in a criminal fraud action could result in debarment or license violation proceedings entailing devastating consequences to family, friends and business associates. Nor is there a practical method to limit disclosure of the privileged communications to the particular criminal proceeding, for, as the Court has recognized in the analogous context of the privilege of self-incrimination, once disclosure is made, the court ordinarily cannot "unring the bell." *Maness v. Meyers*, 419 U.S. 449, 460 (1975).

2. The Rationale Based On A Client's Unavailability To Testify Is Not Limited To Posthumous Disclosures.

The court's alternative rationale for its exception – that disclosure is needed to obtain truthful testimony

because of the unavailability of the client – has equal potential to lead to further erosion of the privilege. As pointed out in Judge Tatel's dissent, death is not the only circumstance in which a witness is unavailable. "Witnesses unable to remember facts, incompetent to testify, or beyond the court's process likewise deny relevant information to the factfinder." Pet. App. 25a. Moreover, "[t]he unavailability of a witness likewise does no greater harm to the factfinding process than an available witness who testifies inaccurately." *Id.* Accordingly, the rationale that truthful evidence must be adduced also contains significant potential for expansion of the Court of Appeals' exception.

II. Even Accepting *Arguendo* The Logic Of The Court Of Appeals' Exception, The Costs Of The Exception In Terms Of Chilling Attorney-Client Communications Far Outweigh Any Countervailing Benefits To The Truth-Seeking Process.

The Court of Appeals decision is all the more troubling because it is sweeping in its potential application. Although the decision only provides for disclosure of attorney-client communications in federal criminal proceedings, it will inhibit client communications in a myriad of contexts in lawyers' offices across the nation. Thus, the decision will preclude clients from relying upon the laws of their home states, which are almost certain to provide that the privilege survives the death of the client. *See* Pet. at 13 n.13 (citing state statutes); Pet. App. 17a (Court of Appeals dissenting opinion).

The evisceration of state privilege laws that will result from the Court of Appeals opinion is of great concern because, as this Court has previously concluded, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930 (1996). Additionally, "any State's promise of confidentiality would have little value if the [client] were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.*

The significance of the Court of Appeals opinion is likely to be enhanced rather than reduced by use of the court's balancing test to determine whether posthumous disclosure is justified in the particular case. The inherently unpredictable and post-hoc nature of the balancing test will create ambiguity concerning the scope of the privilege. Accordingly, no lawyer will be able to offer any assurance to a client that a future court will apply the test to deny disclosure of that client's communications. On the contrary, a lawyer will be bound to warn the client of the prospect of posthumous disclosure along the lines set forth in Judge Tatel's dissent, and perhaps of current disclosure should the client be "unavailable" for some other reasons. Pet. App. 20a (lawyer must warn client that "when you die, I could be forced to testify – against your interests – in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution"). The Court of Appeals' amorphous balancing test thus creates the very problem that led this Court to reject the "control

group" test for the attorney-client privilege in the corporate context – that "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

The Court of Appeals decision will have an overall negative rather than positive effect on the administration of justice. For each time a prosecutor is able to convince a trial judge that the privileged information sought is "substantially important" to a pending criminal proceeding, there will have been hundreds if not thousands of instances in which clients will have been deterred from confiding in their lawyers for fear of posthumous disclosure. Thus, while the Court of Appeals decision will assist prosecutors only in rare cases in which a deceased client has confided "substantially important" information to his lawyer that is not available from any other witness, the ruling will have a significant and very negative impact on many communications between clients and their attorneys in the future.

Moreover, except in a narrow set of circumstances – such as cases involving statements against the client's penal interest when "corroborating circumstances clearly indicate the trustworthiness of the statement" under Fed. R. Evid. 804(b)(3) – the client communications that the lawyer may be obligated to disclose to the grand jury will constitute hearsay inadmissible at a subsequent criminal trial. This hearsay limitation further reduces the practical benefits to the truth-seeking function that will result from the Court of Appeals' exception. Thus, though the Court

of Appeals seeks to craft a narrow exception, the aggregate costs of inhibiting full and frank client communications will far exceed any benefits to the truth-seeking process.

CONCLUSION

For the reasons stated, it is respectfully requested that the judgment be reversed with instructions to affirm the District Court judgment quashing the subpoenas issued to the petitioners.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SWIDLER & BERLIN ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97–1192. Argued June 8, 1998—Decided June 25, 1998

When various investigations of the 1993 dismissal of White House Travel Office employees were beginning, Deputy White House Counsel Vincent W. Foster, Jr., met with petitioner Hamilton, an attorney at petitioner law firm, to seek legal representation. Hamilton took handwritten notes at their meeting. Nine days later, Foster committed suicide. Subsequently, a federal grand jury, at the Independent Counsel's request, issued subpoenas for, *inter alia*, the handwritten notes as part of an investigation into whether crimes were committed during the prior investigations into the firings. Petitioners moved to quash, arguing, among other things, that the notes were protected by the attorney-client privilege. The District Court agreed and denied enforcement of the subpoenas. In reversing, the Court of Appeals recognized that most courts assume the privilege survives death, but noted that such references usually occur in the context of the well-recognized testamentary exception to the privilege allowing disclosure for disputes among the client's heirs. The court declared that the risk of posthumous revelation, when confined to the criminal context, would have little to no chilling effect on client communication, but that the costs of protecting communications after death were high. Concluding that the privilege is not absolute in such circumstances, and that instead, a balancing test should apply, the court held that there is a posthumous exception to the privilege for communications whose relative importance to particular criminal litigation is substantial.

Held: Petitioner's notes are protected by the attorney-client privilege. This Court's inquiry must be guided by "the principles of the common law . . . as interpreted by the courts . . . in light of reason and experience." Fed. Rule Evid. 501. The relevant case law demonstrates that

Syllabus

it has been overwhelmingly, if not universally, accepted, for well over a century, that the privilege survives the client's death in a case such as this. While the Independent Counsel's arguments against the privilege's posthumous survival are not frivolous, he has simply not satisfied his burden of showing that "reason and experience" require a departure from the common-law rule. His interpretation—that the testamentary exception supports the privilege's posthumous termination because in practice most cases have refused to apply the privilege posthumously; that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality; and that, by analogy, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the estate's financial interests are not at stake—does not square with the case law's implicit acceptance of the privilege's survival and with its treatment of testamentary disclosure as an "exception" or an implied "waiver." And his analogy's premise is incorrect, since cases have consistently recognized that the testamentary exception furthers the client's intent, whereas there is no reason to suppose the same is true with respect to grand jury testimony about confidential communications. Knowing that communications will remain confidential even after death serves a weighty interest in encouraging a client to communicate fully and frankly with counsel; posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime. The Independent Counsel's suggestion that a posthumous disclosure rule will chill only clients intent on perjury, not truthful clients or those asserting the Fifth Amendment, incorrectly equates the privilege against self-incrimination with the privilege here at issue, which serves much broader purposes. Clients consult attorneys for a wide variety of reasons, many of which involve confidences that are not admissions of crime, but nonetheless are matters the clients would not wish divulged. The suggestion that the proposed exception would have minimal impact if confined to criminal cases, or to information of substantial importance in particular criminal cases, is unavailing because there is no case law holding that the privilege applies differently in criminal and civil cases, and because a client may not know when he discloses information to his attorney whether it will later be relevant to a civil or criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application and therefore must be rejected. The argument that the existence of, *e.g.*, the crime-fraud and testamentary exceptions to the privilege makes the impact of one more exception marginal fails because there is little

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empirical evidence to support it, and because the established exceptions, unlike the proposed exception, are consistent with the privilege's purposes. Indications in *United States* v. *Nixon*, 418 U. S. 683, 710, and *Branzburg* v. *Hayes*, 408 U. S. 665, that privileges must be strictly construed as inconsistent with truth seeking are inapposite here, since those cases dealt with the creation of privileges not recognized by the common law, whereas here, the Independent Counsel seeks to narrow a well-established privilege. Pp. 3–11.

124 F. 3d 230, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 97–1192

SWIDLER & BERLIN AND JAMES HAMILTON, PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 25, 1998]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner, an attorney, made notes of an initial interview with a client shortly before the client's death. The Government, represented by the Office of Independent Counsel, now seeks his notes for use in a criminal investigation. We hold that the notes are protected by the attorney-client privilege.

This dispute arises out of an investigation conducted by the Office of the Independent Counsel into whether various individuals made false statements, obstructed justice, or committed other crimes during investigations of the 1993 dismissal of employees from the White House Travel Office. Vincent W. Foster, Jr., was Deputy White House Counsel when the firings occurred. In July, 1993, Foster met with petitioner James Hamilton, an attorney at petitioner Swidler & Berlin, to seek legal representation concerning possible congressional or other investigations of the firings. During a 2–hour meeting, Hamilton took three pages of handwritten notes. One of the first entries

in the notes is the word "Privileged." Nine days later, Foster committed suicide.

In December 1995, a federal grand jury, at the request of the Independent Counsel, issued subpoenas to petitioners Hamilton and Swidler & Berlin for, *inter alia*, Hamilton's handwritten notes of his meeting with Foster. Petitioners filed a motion to quash, arguing that the notes were protected by the attorney client privilege and by the work product privilege. The District Court, after examining the notes *in camera*, concluded they were protected from disclosure by both doctrines and denied enforcement of the subpoenas.

The Court of Appeals for the District of Columbia Circuit reversed. *In re Sealed Case*, 124 F. 3d 230 (1997). While recognizing that most courts assume the privilege survives death, the Court of Appeals noted that holdings actually manifesting the posthumous force of the privilege are rare. Instead, most judicial references to the privilege's posthumous application occur in the context of a well recognized exception allowing disclosure for disputes among the client's heirs. *Id.*, at 231–232. It further noted that most commentators support some measure of posthumous curtailment of the privilege. *Id.*, at 232. The Court of Appeals thought that the risk of posthumous revelation, when confined to the criminal context, would have little to no chilling effect on client communication, but that the costs of protecting communications after death were high. It therefore concluded that the privilege was not absolute in such circumstances, and that instead, a balancing test should apply. *Id.*, at 233–234. It thus held that there is a posthumous exception to the privilege for communications whose relative importance to particular criminal litigation is substantial. *Id.*, at 235. While acknowledging that uncertain privileges are disfavored, *Jaffee* v. *Redmond*, 518 U. S. 1, 17–18 (1996), the Court of Appeals determined that the uncertainty introduced by its

balancing test was insignificant in light of existing exceptions to the privilege. 124 F. 3d, at 235. The Court of Appeals also held that the notes were not protected by the work product privilege.

The dissenting judge would have affirmed the District Court's judgment that the attorney client privilege protected the notes. *Id.*, at 237. He concluded that the common–law rule was that the privilege survived death. He found no persuasive reason to depart from this accepted rule, particularly given the importance of the privilege to full and frank client communication. *Id.*, at 237.

Petitioners sought review in this Court on both the attorney client privilege and the work product privilege.[1] We granted certiorari, 523 U. S. __ (1998), and we now reverse.

The attorney client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981); *Hunt* v. *Blackburn*, 128 U. S. 464, 470 (1888). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn*, *supra*, at 389. The issue presented here is the scope of that privilege; more particularly, the extent to which the privilege survives the death of the client. Our interpretation of the privilege's scope is guided by "the principles of the common law . . . as interpreted by the courts . . . in the light of reason and experience." Fed. Rule Evid. 501; *Funk* v. *United States*, 290 U. S. 371 (1933).

The Independent Counsel argues that the attorney–client privilege should not prevent disclosure of confidential communications where the client has died and

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[1]Because we sustain the claim of attorney-client privilege, we do not reach the claim of work product privilege.

the information is relevant to a criminal proceeding. There is some authority for this position. One state appellate court, *Cohen* v. *Jenkintown Cab Co.*, 238 Pa. Super. 456, 357 A. 2d 689 (1976), and the Court of Appeals below have held the privilege may be subject to posthumous exceptions in certain circumstances. In *Cohen*, a civil case, the court recognized that the privilege generally survives death, but concluded that it could make an exception where the interest of justice was compelling and the interest of the client in preserving the confidence was insignificant. *Id.*, 462–464, 357 A.2d, at 692–693.

But other than these two decisions, cases addressing the existence of the privilege after death—most involving the testamentary exception—uniformly presume the privilege survives, even if they do not so hold. See, *e.g.*, *Mayberry* v. *Indiana*, 670 N. E. 2d 1262 (Ind. 1996); *Morris* v. *Cain*, 39 La. Ann. 712, 1 So. 797 (1887); *People* v. *Modzelewski*, 611 N. Y. S. 2d 22, 203 A. 2d 594 (1994). Several State Supreme Court decisions expressly hold that the attorney-client privilege extends beyond the death of the client, even in the criminal context. See *In re John Doe Grand Jury Investigation*, 408 Mass. 480, 481–483, 562 N. E. 2d 69, 70 (1990); *State* v. *Doster*, 276 S.C. 647, 650–651, 284 S. E. 2d 218, 219 (1981); *State* v. *Macumber*, 112 Ariz. 569, 571, 544 P. 2d 1084, 1086 (1976). In *John Doe Grand Jury Investigation*, for example, the Massachusetts Supreme Court concluded that survival of the privilege was "the clear implication" of its early pronouncements that communications subject to the privilege could not be disclosed at any time. 408 Mass., at 483, 562 N. E. 2d, at 70. The court further noted that survival of the privilege was "necessarily implied" by cases allowing waiver of the privilege in testamentary disputes. *Ibid.*

Such testamentary exception cases consistently presume the privilege survives. See, *e.g.*, *United States* v. *Osborn*, 561 F. 2d 1334, 1340 (CA9 1977); *DeLoach* v. *Myers*, 215 Ga. 255, 259–260, 109 S. E. 2d 777, 780–781 (1959); *Doyle* v. *Reeves*, 112 Conn. 521, 152 A. 882 (1931); *Russell* v. *Jackson*, 9 Hare. 387, 68 Eng. Rep. 558 (V.C. 1851). They view testamentary disclosure of communications as an exception to the privilege: "[T]he general rule with respect to confidential communications . . . is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs." *Osborn*, 561 U. S., at 1340. The rationale for such disclosure is that it furthers the client's intent. *Id.*, at 1340, n. 11.[2]

Indeed, in *Glover* v. *Patten*, 165 U. S. 394, 406–408 (1897), this Court, in recognizing the testamentary exception, expressly assumed that the privilege continues after the individual's death. The Court explained that testamentary disclosure was permissible because the privilege, which normally protects the client's interests, could be impliedly waived in order to fulfill the client's testamentary intent. *Id.*, at 407–408 (quoting *Blackburn* v. *Crawfords*, 3 Wall. 175 (1866), and *Russell* v. *Jackson*, *supra*).

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[2]About half the States have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client (as opposed to parties claiming against the estate, for whom the privilege is not waived). See, *e.g.*, Ala. Rule Evid. 502 (1996); Ark. Code Ann. §16–41–101, Rule 502 (Supp. 1997); Neb. Rev. Stat. §27 503, Rule 503 (1995). These statutes do not address expressly the continuation of the privilege outside the context of testamentary disputes, although many allow the attorney to assert the privilege on behalf of the client apparently without temporal limit. See, *e.g.*, Ark. Code Ann. §16–41–101, Rule 502(c) (Supp. 1997). They thus do not refute or affirm the general presumption in the case law that the privilege survives. California's statute is exceptional in that it apparently allows the attorney to assert the privilege only so long as a holder of the privilege (the estate's personal representative) exists, suggesting the privilege terminates when the estate is wound up. See Cal. Code Evid. Ann. §§954, 957 (West 1995). But no other State has followed California's lead in this regard.

The great body of this caselaw supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one. Given the language of Rule 501, at the very least the burden is on the Independent Counsel to show that "reason and experience" require a departure from this rule.

The Independent Counsel contends that the testamentary exception supports the posthumous termination of the privilege because in practice most cases have refused to apply the privilege posthumously. He further argues that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality. He then reasons by analogy that in criminal proceedings, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the financial interests of the estate are not at stake.

But the Independent Counsel's interpretation simply does not square with the caselaw's implicit acceptance of the privilege's survival and with the treatment of testamentary disclosure as an "exception" or an implied "waiver." And the premise of his analogy is incorrect, since cases consistently recognize that the rationale for the testamentary exception is that it furthers the client's intent, see, *e.g., Glover, supra.* There is no reason to suppose as a general matter that grand jury testimony about confidential communications furthers the client's intent.

Commentators on the law also recognize that the general rule is that the attorney-client privilege continues after death. See, *e.g.*, 8 Wigmore, Evidence §2323 (McNaughton rev. 1961); Frankel, The Attorney-Client Privilege After the Death of the Client, 6 Geo. J. Legal Ethics 45, 78–79 (1992); 1 J. Strong, McCormick on Evidence §94, p. 348 (4th ed. 1992). Undoubtedly, as the Independent Counsel emphasizes, various commentators have criticized this rule, urging that the privilege should

be abrogated after the client's death where extreme injustice would result, as long as disclosure would not seriously undermine the privilege by deterring client communication. See, *e.g.*, C. Mueller & L. Kirkpatrick, 2 Federal Evidence §199, at 380–381 (2d ed. 1994); Restatement (Third) of the Law Governing Lawyers §127, Comment *d* (Proposed Final Draft No. 1, Mar. 29, 1996). But even these critics clearly recognize that established law supports the continuation of the privilege and that a contrary rule would be a modification of the common law. See, *e.g.*, Mueller & Kirkpatrick, *supra,* at 379; Restatement of the Law Governing Lawyers, *supra,* §127, Comment *c*; 24 C. Wright & K. Graham, Federal Practice and Procedure §5498, p. 483 (1986).

Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

The Independent Counsel suggests, however, that his proposed exception would have little to no effect on the client's willingness to confide in his attorney. He reasons that only clients intending to perjure themselves will be chilled by a rule of disclosure after death, as opposed to truthful clients or those asserting their Fifth Amendment privilege. This is because for the latter group, communications disclosed by the attorney after the client's death purportedly will reveal only information that the client

himself would have revealed if alive.

The Independent Counsel assumes, incorrectly we believe, that the privilege is analogous to the Fifth Amendment's protection against self-incrimination. But as suggested above, the privilege serves much broader purposes. Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. See *Jaffe*, 518 U. S., at 12; *Fisher* v. *United States*, 425 U. S. 391, 403 (1976). This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.

The Independent Counsel additionally suggests that his proposed exception would have minimal impact if confined

to criminal cases, or, as the Court of Appeals suggests, if it is limited to information of substantial importance to a particular criminal case.[3] However, there is no case authority for the proposition that the privilege applies differently in criminal and civil cases, and only one commentator ventures such a suggestion, see Mueller & Kirkpatrick, *supra*, at 380–381. In any event, a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege. See *Upjohn*, 449 U. S., at 393; *Jaffee*, *supra*, at 17–18.

In a similar vein, the Independent Counsel argues that existing exceptions to the privilege, such as the crime-fraud exception and the testamentary exception, make the impact of one more exception marginal. However, these exceptions do not demonstrate that the impact of a posthumous exception would be insignificant, and there is little empirical evidence on this point.[4] The established

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[3]Petitioner, while opposing wholesale abrogation of the privilege in criminal cases, concedes that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not presented here.

[4]Empirical evidence on the privilege is limited. Three studies do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication. Alexander, The Corporate Attorney Client Privilege: A Study of the Participants, 63 St. John's L. Rev. 191 (1989); Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 352 (1989); Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 Yale L. J. 1226 (1962). These articles note that clients are

exceptions are consistent with the purposes of the privilege, see *Glover*, 165 U. S., at 407–408; *United States* v. *Zolin*, 491 U. S. 554, 562–563 (1989), while a posthumous exception in criminal cases appears at odds with the goals of encouraging full and frank communication and of protecting the client's interests. A "no harm in one more exception" rationale could contribute to the general erosion of the privilege, without reference to common law principles or "reason and experience."

Finally, the Independent Counsel, relying on cases such as *United States* v. *Nixon*, 418 U. S. 683, 710 (1974), and *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), urges that privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking. But both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to "construe" the privilege, but to narrow it, contrary to the weight of the existing body of caselaw.

It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this. While

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often uninformed or mistaken about the privilege, but suggest that a substantial number of clients and attorneys think the privilege encourages candor. Two of the articles conclude that a substantial number of clients and attorneys think the privilege enhances open communication, Alexander, *supra*, at 244–246, 261, and that the absence of a privilege would be detrimental to such communication, Comment, 71 Yale L. J., *supra*, at 1236. The third article suggests instead that while the privilege is perceived as important to open communication, limited exceptions to the privilege might not discourage such communication, Zacharias, *supra*, at 382, 386. Similarly, relatively few court decisions discuss the impact of the privilege's application after death. This may reflect the general assumption that the privilege survives—if attorneys were required as a matter of practice to testify or provide notes in criminal proceedings, cases discussing that practice would surely exist.

the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation nonetheless—as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.

Rule 501's direction to look to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" does not mandate that a rule, once established, should endure for all time. *Funk* v. *United States*, 290 U. S. 371, 381 (1933). But here the Independent Counsel has simply not made a sufficient showing to overturn the common law rule embodied in the prevailing caselaw. Interpreted in the light of reason and experience, that body of law requires that the attorney client privilege prevent disclosure of the notes at issue in this case. The judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 97–1192

SWIDLER & BERLIN AND JAMES HAMILTON, PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 25, 1998]

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Although the attorney-client privilege ordinarily will survive the death of the client, I do not agree with the Court that it inevitably precludes disclosure of a deceased client's communications in criminal proceedings. In my view, a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality.

We have long recognized that "[t]he fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." *Funk* v. *United States,* 290 U. S. 371, 381 (1933). In light of the heavy burden that they place on the search for truth, see *United States* v. *Nixon,* 418 U. S. 683, 708–710 (1974), "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances," *Herbert* v. *Lando,* 441 U. S. 153, 175 (1979). Consequently, we construe the scope of privileges narrowly. See *Jaffee* v. *Redmond,* 518 U. S. 1, 19 (1996) (SCALIA, J., dissenting); see also *University of Pennsylva-*

nia v. *EEOC*, 493 U. S. 182, 189 (1990). We are reluctant to recognize a privilege or read an existing one expansively unless to do so will serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel* v. *United States*, 445 U. S. 40, 50 (1980) (internal quotation marks omitted).

The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice. See *Upjohn Co.* v. *United States*, 449 U. S. 383, 389 (1981). The systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence. A privilege should operate, however, only where "necessary to achieve its purpose," see *Fisher* v. *United States*, 425 U. S. 391, 403 (1976), and an invocation of the attorney-client privilege should not go unexamined "when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise," *Cohen* v. *Jenkintown Cab Co.*, 238 Pa. Super. 456, 464, 357 A. 2d 689, 693–694 (1976).

I agree that a deceased client may retain a personal, reputational, and economic interest in confidentiality. See *ante*, at 7. But, after death, the potential that disclosure will harm the client's interests has been greatly diminished, and the risk that the client will be held criminally liable has abated altogether. Thus, some commentators suggest that terminating the privilege upon the client's death "could not to any substantial degree lessen the encouragement for free disclosure which is [its] purpose." 1 J. Strong, McCormick on Evidence §94, p. 350 (4th ed. 1992); see also Restatement (Third) of the Law Governing Lawyers §127, Comment *d* (Proposed Final Draft No. 1, Mar. 29, 1996). This diminished risk is coupled with a heightened urgency for discovery of a deceased client's communications in the criminal context. The privilege does not "protect[] disclosure of the underlying facts by

those who communicated with the attorney," *Upjohn*, *supra*, at 395, and were the client living, prosecutors could grant immunity and compel the relevant testimony. After a client's death, however, if the privilege precludes an attorney from testifying in the client's stead, a complete "loss of crucial information" will often result, see 24 C. Wright & K. Graham, Federal Practice and Procedure §5498, p. 484 (1986).

As the Court of Appeals observed, the costs of recognizing an absolute posthumous privilege can be inordinately high. See *In re Sealed Case*, 124 F. 3d 230, 233–234 (CADC 1997). Extreme injustice may occur, for example, where a criminal defendant seeks disclosure of a deceased client's confession to the offense. See *State* v. *Macumber*, 112 Ariz. 569, 571, 544 P. 2d 1084, 1086 (1976); cf. *In the Matter of a John Doe Grand Jury Investigation*, 408 Mass. 480, 486, 562 N. E. 2d 69, 72 (1990) (Nolan, J., dissenting). In my view, the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences. See, *e.g.*, *Schlup* v. *Delo*, 513 U. S. 298, 324–325 (1995); *In re Winship*, 397 U. S. 358, 371 (1970) (Harlan, J., concurring). Indeed, even petitioner acknowledges that an exception may be appropriate where the constitutional rights of a criminal defendant are at stake. An exception may likewise be warranted in the face of a compelling law enforcement need for the information. "[O]ur historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." *Nixon*, *supra*, at 709 (internal quotation marks omitted); see also *Herrera* v. *Collins*, 506 U. S. 390, 398 (1993). Given that the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts, I do not be-

lieve that the attorney-client privilege should act as an absolute bar to the disclosure of a deceased client's communications. When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.

A number of exceptions to the privilege already qualify its protections, and an attorney "who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit." 124 F. 3d, at 235. In the situation where the posthumous privilege most frequently arises—a dispute between heirs over the decedent's will—the privilege is widely recognized to give way to the interest in settling the estate. See *Glover* v. *Patten*, 165 U. S. 394, 406–408 (1897). This testamentary exception, moreover, may be invoked in some cases where the decedent would not have chosen to waive the privilege. For example, "a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed." 124 F. 3d, at 234. Among the Court's rationales for a broad construction of the posthumous privilege is its assertion that "[m]any attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed . . . which the client would not wish divulged." *Ante*, at 8. That reasoning, however, would apply in the testamentary context with equal force. Nor are other existing exceptions to the privilege—for example, the crime-fraud exception or the exceptions for claims relating to attorney competence or compensation—necessarily consistent with "encouraging full and frank communication" or "protecting the client's interests," *ante*, at 10. Rather, those exceptions reflect the understanding that, in

certain circumstances, the privilege "'ceases to operate'" as a safeguard on "the proper functioning of our adversary system." See *United States* v. *Zolin*, 491 U. S. 554, 562–563 (1989).

Finally, the common law authority for the proposition that the privilege remains absolute after the client's death is not a monolithic body of precedent. Indeed, the Court acknowledges that most cases merely "presume the privilege survives," see *ante*, at 4–5, and it relies on the case law's "implicit acceptance" of a continuous privilege, see *ante*, at 6. Opinions squarely addressing the posthumous force of the privilege "are relatively rare." See 124 F. 3d, at 232. And even in those decisions expressly holding that the privilege continues after the death of the client, courts do not typically engage in detailed reasoning, but rather conclude that the cases construing the testamentary exception imply survival of the privilege. See, *e.g.*, *Glover*, *supra*, at 406–408; see also Wright & Graham, *supra*, §5498, at 484 ("Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy").

Moreover, as the Court concedes, see *ante*, at 4, 6, there is some authority for the proposition that a deceased client's communications may be revealed, even in circumstances outside of the testamentary context. California's Evidence Code, for example, provides that the attorney-client privilege continues only until the deceased client's estate is finally distributed, noting that "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged." Cal. Evid. Code Ann. §954, and comment, p. 232, §952 (West 1995). And a state appellate court has admitted an attorney's testimony concerning a deceased client's communications after "balanc[ing] the necessity for revealing the substance of the [attorney-client conversation] against the unlikelihood of

any cognizable injury to the rights, interests, estate or memory of [the client]." See *Cohen*, *supra*, at 464, 357 A. 2d, at 693. The American Law Institute, moreover, has recently recommended withholding the privilege when the communication "bears on a litigated issue of pivotal significance" and has suggested that courts "balance the interest in confidentiality against any exceptional need for the communication." Restatement (Third) of the Law Governing Lawyers §127, at 431, Comment *d*; see also 2 C. Mueller & L. Kirkpatrick, Federal Evidence, §199, p. 380 (2d ed. 1994) ("[I]f a deceased client has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences").

Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication. In my view, the cost of silence warrants a narrow exception to the rule that the attorney-client privilege survives the death of the client. Moreover, although I disagree with the Court of Appeals' notion that the context of an initial client interview affects the applicability of the work product doctrine, I do not believe that the doctrine applies where the material concerns a client who is no longer a potential party to adversarial litigation.

Accordingly, I would affirm the judgment of the Court of Appeals. Although the District Court examined the documents *in camera*, it has not had an opportunity to balance these competing considerations and decide whether the privilege should be trumped in the particular circumstances of this case. Thus, I agree with the Court of Appeals' decision to remand for a determination whether any portion of the notes must be disclosed.

With respect, I dissent.